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JOINT APPENDIX

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED JUN 6 1956
Joseph W. Stewart
CLERK

No. 13,256

JOSEPH F. FINNEGAN, Director,
Federal Mediation & Conciliation Service,
ET AL., Appellants,

v.

JOHN T. DALY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

# UNITED STATES COURT OF APPEALS

For The District Of Columbia Circuit

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No. 13,256

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JOSEPH F. FINNEGAN, Director,
Federal Mediation & Conciliation Service,
ET AL.,

Appellants,

v.

JOHN T. DALY,

Appellee

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## JOINT APPENDIX

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## PLEADINGS, DOCKET ENTRIES AND OTHER PAPERS

* * * * * *

18 [Filed July 20, 1954]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN T. DALY,
2434 39th Place N W,
Washington, D. C.

Plaintiff

vs

WHITELY P. McCOY, Director
Federal Mediation & Conciliation Service
14th and Constitution Ave. N W,
Washington, D. C.

L. E. EADY,
Director of Administrative Management,
Federal Mediation & Conciliation Service,
14th and Constitution Ave. N W,
Washington, D. C.

PHILIP YOUNG, Chairman
U. S. Civil Service Commission,
8th and F Streets N W,
Washington, D. C.

Civil Action
No. 1897-54

GEORGE M. MOORE, Member
U. S Civil Service Commission,
8th and F Streets N W,
Washington, D. C.

FREDERICK J. LAWTON, Member
U. S. Civil Service Commission,
8th and F Streets N W,
Washington, D. C.

Defendants

### AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND AFFIRMATIVE RELIEF

1. Jurisdiction is founded upon Title 28, Section 2201 U. S. C. as amended by the Act of Congress approved May 24, 1949, 63 Stat 105.

2. Plaintiff is a citizen of the United States and a resident of the District of Columbia and he brings this action in his own right. That the value of the object sought here exceeds the sum of Three Thousand Dollars ($3000.00), exclusive of interest and costs. Plaintiff is a Veteran of World War I and is a Veteran Preference Eligible as that term is defined under Section 2 of the Veterans Preference Act of 1944 as amended. This cause of action arises under Section 14 of the Veterans Preference Act of 1944 as amended, 5 U. S. C. 863; Act of Congress of August 24, 1912, 37 Stat 539 and the rules and regulations of the Civil Service Commission promulgated pursuant to said laws governing the employment of Veterans of the military service as civilian personnel of the Government of the United States and particularly in the Federal Mediation and Conciliation Service. Also, the Communications Act of June 19, 1934, Title 47 Section 605 U. S. C.

3. The defendant, Whitely P. McCoy, is the duly appointed, acting and qualified Director of the Federal Mediation & Conciliation Service, and the defendant, L. E. Eady, is the duly appointed, acting and qualified Director of Administrative Management of the aforesaid Agency, and further, these two defendants have control of and supervision over all of the employees of said Agency. These two defendants are hereinafter referred to as the Agency.

4. That the defendant, Philip Young, is the duly appointed, acting and qualified Chairman of the U. S. Civil Service Commission.

5. That the defendant, George M. Moore, is the duly appointed, acting and qualified Member of the aforesaid Commission.

6. That the defendant, Frederick K. Lawton, is the duly appointed, acting and qualified Member of the aforesaid Commission

7. That the said defendants, Whitely P. McCoy and L. E. Eady, have under their control and supervision the employment of civilian personnel in said Agency including persons in the same grade positions as has been held by plaintiff.

8. That the said defendants, Philip Young, George M. Moore and Frederick J. Lawton in their official capacity as the U. S. Civil Service

Commission, constitute the full membership of said Commission and as such are charged by law with the enforcement of all of the laws of the United States relating to employment, separations, demotions, suspensions and retirement of all civilian employees of the United States, commonly known as civil service employees. These defendants are hereinafter referred to as CSC.

9. Plaintiff alleges that he was appointed a Commissioner of Conciliation of said Agency on September 15, 1938, by the then Honorable Frances L. Perkins, Secretary of Labor at a grade 9, salary $3200.00 and that he has served continuously and satisfactorily in said capacity and/or in the higher grade of a Regional Director of said Agency. While plaintiff was serving as a said Commissioner, GS 13, salary $9360.00, to-wit, September 10, 1952, said Agency filed certain charges against him to separate him from his aforesaid position with said Agency. (Plaintiff's Exhibit 1, attached hereto and made a part hereof.) The then Counsel for plaintiff, having had conferences with said Agency and in the belief that said Agency might reinstate plaintiff, prepared for plaintiff's signature a letter dated October 25, 1952. (Plaintiff's Exhibit 2, attached hereto and made a part hereof.) On November 14, 1952, the date plaintiff's separation was to become effective, said Agency refused to reinstate plaintiff and treated said letter as an answer to said charges and held that his retention was not warranted. (Plaintiff's Exhibit 3, attached hereto and made a part hereof.) Plaintiff denied in his affidavit dated December 27, 1952 all of the alleged charges except being late on the morning of August 25, 1952, as is described in Charge 2, Specification b. (Plaintiff's Exhibit 4, attached hereto and made a part hereof.) On March 25, 1953, the Chief Law Officer of CSC sustained plaintiff's separation. On or about April 2, 1953 plaintiff appealed said decision to the CSC. After a lapse of about 11 months, the CSC sustained the decision of its Chief Law Officer, said decision being dated March 5, 1954. (Plaintiff's Exhibit 5 and 6, attached hereto and made a part hereof.) On March 31, 1954, plaintiff filed a request for a rehearing before the CSC (Plaintiff Exhibit 7, attached hereto and made a part hereof.) and on April 2, 1954 the CSC

denied plaintiff a rehearing. (Plaintiff's Exhibit 8, attached hereto and made a part hereof.) Plaintiff was separated from his said position on November 14, 1952. Plaintiff at no time during his 14 years of continuous service with said Agency had less that a satisfactory efficiency rating. The last one received by plaintiff was "satisfactory" which covered the period from 12-30-50, to 9-30-51 and this one was approved by the rating committee on April 28, 1952, with notice thereof to plaintiff dated May 8, 1952. Plaintiff alleges that the last four spaces which are unmarked, under instructions from the Agency, had no application to him in his then position of Regional Director. (Plaintiff's Exhibit 9, attached hereto and made a part hereof.)

10. Plaintiff alleges that the Agency in its charges against him failed and neglected, as required by Section 14 of the Veterans Preference Act of 1944 as amended and the Regulations of the CSC to give him, "specifically and in detail, the charges preferred against him and his separation from his position was null and void. Plaintiff alleges that as to Charge 1, Specification (a) that it is a conclusion and lacks specificity and said Holbrook's own affidavit (Plaintiff's Exhibit 10, attached hereto and made a part hereof.) establishes that plaintiff was, in fact, in contact with one of the parties on that morning. As to Charge 1, Specifications (b), (c) and (d), these are all conclusions and lack specificity. (Plaintiff hereinafter makes separate allegations as to Specifications (c) and (d). As to Charge 2, these are conclusions and recite only one instance to support said charge and this one upon pure speculation. As to Charge 3, Specification (a) and (b), plaintiff returned to his office late on August 18, 1952 from vacation but on this date was the first occasion this subject was discussed with him, it being not too uncommon for him and others to report late for duty at intervals when previously required to preside at labor disputes long hours into the night and on holidays. As to Charge 3, Specification (c), these are a series of conclusion and provide no specificity as required. The CSC in sustaining the Charges, well knowing said charges failed and neglected, as required by said Section 14, acted arbitrarily and capriciously.

11. Plaintiff alleges that as to Charge 1, Specification (d) the Agency charges plaintiff with a most serious crime, a falsehood, when said Specification recited, "--that you (plaintiff) had no contact with the parties that day--", whereas said Holbrook's own affidavit (Ex. 10) conclusively establishes that plaintiff was, in fact, telling the truth. Plaintiff alleges that when the Agency included this Specification (d) in said Charges, well knowing it was a grave error, and later when said Agency and more particularly the CSC failed and neglected to dismiss this most serious charge such joint actions constituted bias and prejudice and such joint actions were arbitrary and capricious. Plaintiff further alleges that he was denied a fair and impartial hearing upon said charges.

12. Plaintiff alleges as to Charge 1, Specification (c) that he did at or about 3:15 PM on April 3, 1952, telephone said Holbrook and that the said Holbrook, without any knowledge or authority from him, instructed his Secretary, Miss Barrett, at his buzz signal on an extension telephone in her office, to intercept and record in stenographic notes said telephone conversation which she did. Miss Barrett immediately following said conversations reduced her stenographic notes to a Memorandum. Later, on January 23, 1953, both said Holbrook (Ex. 10) and Miss Barrett (Plaintiff's Exhibit 11, attached hereto and made a part hereof.) made affidavits, (Ex. 10-11) before one Rene Callec, an investigator of CSC, in which they both admitted the interception as aforesaid and said affidavit of Miss Barrett recited the full text of the said telephone conversations. Plaintiff alleges that he saw both of the said affidavits in his file at the CSC after the adverse decision of the Agency dated November 14, 1952 but about a week before the Hearing in CSC on March 6, 1953, before the Trial Examiner Welch of the office of the Chief Law Officer of CSC, and plaintiff further alleges that both of the affidavits were later listed in the decision of the Chief Law Officer dated March 25, 1953. Said telephone conversations were divulged indiscriminately. Plaintiff further alleges that the first knowledge he had that such intercepted and divulged telephone conversations, as aforesaid, were unlawful and in violation of Section 605 of the Federal Communication Act was on or about April 7, 1954 when

plaintiff and his present Counsel examined said affidavits in his file in the main office of the CSC, and that no other person at any other time called it to his attention. Plaintiff alleges that said interception and divulgence of the said telephone conversation and its use and consideration as evidence by the Agency when such was in the Memorandum form and its use and consideration as evidence in all of the levels of the Administrative proceedings up to and including the CSC were in violation of Section 605 of the Federal Communications Act and such contaminated the record and vitiated the proceedings. Plaintiff further alleges that in these circumstances the decision of the CSC was arbitrary and capricious and plaintiff was denied a fair and impartial hearing in violation of the Fourth and Fifth Amendments to the Constitution.

13. Plaintiff alleges as shown in this amended complaint that he was demoted on June 2, 1952, from a GS 14, salary $10,200.00, to a GS 13, salary $9360.00, but the alleged grounds of said demotion later became Charge 1 of the Charges dated September 10, 1952, to separate plaintiff from his position. Said demotion was effectuated by the Agency without any compliance with Section 14 which required "-at least 30 days' advance written notice-" and therein, "stating any and all reasons, specifically and in detail, for any such proposed action--". Said Agency had before it the evidence represented by the Barrett Memorandum and later the Agency and the CSC had before them the evidence represented by the affidavits of Miss Barrett and said Holbrook as described in Par. 12 of this amended complaint. Plaintiff alleges that both the Agency and the CSC ignored illegality of the evidence and that Holbrook's affidavit had stated that plaintiff had been, in fact, in "contact with the parties that day-" notwithstanding the decision of CSC dated March 5, 1954 states, "--that Mr. Daly did not exercise his right of appeal of the demotion action of June 2, 1952 within a reasonable time after receipt of the Agency letter of August 5, 1952--" Said CSC well knew that the Agency was required first to give the plaintiff, "at least 30 days' advance notice in writing-" and also in said notice, "stating any and all reasons, specifically and in detail, for any such proposed action-", yet the CSC holds

that plaintiff did not exercise his right of appeal of the demotion action within a reasonable time after receipt of the Agency's letter of August 5, 1952 which was 3 months and 3 days after the earliest date said Agency could have given plaintiff the required "notice" and "reasons" to effectuate his demotion on June 2, 1952 and the decision of CSC deliberately shifted the burden to act affirmatively to the plaintiff when it well knew that this affirmative burden rested solely upon the Agency. Said CSC in its decision omits therefrom the fact that even the Agency letter of August 5, 1952 failed to state "any reason" for the demotion so plaintiff had nothing even at that time to answer or appeal. Plaintiff further alleges that the decision of the CSC on said demotion, it having been incorporated as Charge 1, which was sustained, with the evidence before CSC which disproved this Charge 1, was arbitrary and capricious and plaintiff was denied a fair and impartial hearing. Plaintiff further alleges that his removal upon the charges removed him from a position of GS 13, which he did not legally hold.

14. Plaintiff alleges that the said Agency by advising plaintiff in the Charges that, "--it has been determined that you (Plaintiff) can no longer satisfactorily perform the duties of a Commissioner of Conciliation and should be separated from the Service", and the date of the discharge having been determined when the said Agency in the Charges stated that said separation would become "--effective thirty calendar days after the date of the receipt of this letter by you--", without awaiting plaintiff's answer to these charges, which he was, under said Section 14, as well as the basic of August 24, 1912, and the Regulations of CSC, entitled to make to the charges, prejudged the case and the plaintiff's separation, under these circumstances, was arbitrary, capricious and in flagrant violations of the aforesaid laws and regulations. Plaintiff was denied a fair and impartial hearing upon said charges. Plaintiff was denied due process of law under the Fifth Amendment to the Constitution.

15. Plaintiff alleges that he was separated from his position, as aforesaid, on November 14, 1952 while he was then perfecting his various appeals under Section 14 of the Veterans Preference Act of 1944 as amended

and that it was not until March 31, 1954 (Ex. 4) that the CSC finally decided his case and that his removal from his position did not become final until March 31, 1954. Plaintiff alleges that his removal prior to March 31, 1954 was without authority of law.

16. Plaintiff alleges that the final decision of the CSC, after having his case under advisement for about 11 months, was dated March 31, 1954, but that his former Counsel on July 10, 1953, took his oath of office as Chief Judge of the Municipal Court for the District of Columbia. In these circumstances, plaintiff was required to engage new Counsel and on March 31, 1954, plaintiff requested a Rehearing before the CSC (Plaintiff's Exhibit 7, attached hereto and made a part hereof) to enable him to have the CSC pass upon the substantial and new questions of law raised herein, thus exhausting his administrative remedies. On April 2, 1954, the CSC denied plaintiff's request for a Rehearing. (Plaintiff's Exhibit 8, attached hereto and made a part hereof.)

WHEREFORE, Plaintiff prays judgment as follows:

1. That due process of this Court issue directing and commanding the said defendants, and each of them, to appear and answer this amended bill of complaint.

2. That the defendants, and each of them, be required to produce all evidence upon which plaintiff's removal, as a civil service employee, was predicated.

3. That the Court find and declare that plaintiff should not have been separated from his position prior to the final decision of the CSC dated March 31, 1954.

4. That a declaratory judgment be entered in this cause, adjudicating and declaring that the plaintiff's separation from his position was illegal and unlawful, and setting aside and holding for naught any finding which the defendants or any of them made on the basis of the alleged separation charges against the plaintiff.

5. That the Court, as a part of the declaratory judgment, order and direct the said defendants to forthwith restore or reinstate plaintiff to his position as Commissioner of the Federal Mediation and Conciliation

Service, Washington, D. C., as a GS 14, salary $10,200.00, as of the date of his illegal and unlawful separation from his position, as aforesaid, and awarding to the plaintiff all of the rights, benefits and privileges which may or might have accrued to him had not the plaintiff been illegally and unlawfully separated from Governmental employment.

6. That plaintiff have such other and further relief as to the Court may appear just and proper.

/s/ John T. Daly

* * * * * *

/s/ Rees B. Gillespie,
Shoreham Building,
Attorney for Plaintiff

(CERTIFICATE OF SERVICE)

---

27 [Filed July 20, 1954]

(Plaintiff's Exhibit No. 1)

FEDERAL MEDIATION AND CONCILIATION SERVICE
Washington 25, D. C.

September 10, 1952

CONFIDENTIAL

Mr. John T. Daly
2439 - 39th Place, N. W.
Washington, D. C.

Dear Commissioner Daly:

This letter is an official notification that it is the intention of the Federal Mediation and Conciliation Service to separate you for cause from the position of Commissioner of Conciliation, grade GS-13, effective thirty calendar days after the date of receipt of this letter by you.

This proposed adverse action is based on the following charges:

1. Dereliction of duty, failure to service an assigned case, and giving false information to the Director of Region 3 at the time you were stationed in Philadelphia, Pennsylvania. Specifically, it is alleged that:

a. On the morning of April 3, 1952, you could not be located

by the Regional Director when you were needed to service the Food Fair - A & P Stores situation which had been assigned to you.

b. At 1:30 P.M. that day, you falsely informed your Regional Director by telephone that you were meeting with the parties involved in the Food Fair situation.

c. At 3:15 P.M. that day, you telephoned your Regional Director and falsely informed him you were meeting with representative Mullin of the A & P Stores.

d. When you personally reported to your Regional Director at 5:30 P.M. that day, you compounded your falsification by alleging that you informed him only that you were "in contact" with the parties; upon presentation of proof that you had no contact with the parties that day, you could not explain your actions for that day.

2. You have a habit of intemperance that has seriously interfered with your work performance as a representative of the Service. Specifically, it is alleged that despite the fact that the Associate Director discussed this aspect of your conduct fully with you on April 9, 1952, and despite your promises to improve your conduct, on August 26, 1952 while on duty in New York City, the Director of Region 2, at 2:30 P.M., found you slumped over your desk, awakened you, and found you apparently under the influence of intoxicants and in no condition to work.

3. While assigned to New York City, you disregarded instructions, were arbitrarily unavailable for assignments, and disregarded the case reporting practices of the Service. Specifically, it is alleged that:

a. On many Monday mornings, and particularly on Monday, August 18, 1952, you had not previously reported your whereabouts to the Regional Director and were not available to service a case previously assigned you.

28 b. Despite the fact that upon your arrival in the office on Monday, August 18, 1952 at 12:30 P.M., the Regional Director informed you that your habit of taking the morning train from your home in Washington, D. C. and arriving tardy in the office was not acceptable and should be stopped, you disregarded his instructions and on the following Monday,

August 25, 1952, you reported for duty at 12:30 P.M.

c. The omissions in such reports as you made and your delays in reporting dispute cases were in disregard of Service policy and procedure, and you were so informed by the Director of Region 2 on August 18, 1952.

As a result of your misconduct and failure to perform satisfactorily the duties of your office while stationed in Philadelphia, Pennsylvania, you were placed on probation and transferred to New York City. It is apparent that you have failed to comply with the terms applicable to your service during the probationary period and, therefore, it has been determined that you can no longer satisfactorily perform the duties of a Commissioner of Conciliation and should be separated from the Service.

This proposed adverse action is in accordance with the provisions of Section 14 of the Veterans Preference Act of 1944. You will be afforded a period of time, not to exceed fifteen calendar days after the date of receipt of this letter by you, in which to answer these charges and to submit any supporting affidavits or evidence you wish. Your answer should be in writing and should be submitted in duplicate to:

Mr. L. E. Eady, Director
Administrative Management
Federal Mediation and Conciliation Service
Department of Labor Building, Room 3413
Washington 25, D. C.

Should your answers to these charges be deemed not satisfactory by the Service, or should you fail to reply in writing to these charges, the adverse action outlined in the first paragraph of this letter will be carried out and you will be separated.

Effective as of today, your official duty station is being changed from New York, New York to Washington, D. C. where you will be attached to the Office of the Associate Director of the Service for reporting purposes only. During this period of advance notice of our contemplated action, you will be retained in duty status on annual leave.

Our notice of final decision, if adverse, will inform you of any further appeal rights you may have under the Grievance Procedure of the

Service or under the provisions of the Veterans Preference Act of 1944.

You are requested to acknowledge receipt of this letter.

Very truly yours,

/s/ L. E. Eady

L. E. Eady
Director
Administrative Management

---

29 [Filed July 20, 1954]
(Plaintiff's Exhibit No. 2)

2434 - 39th Place, N. W.
Washington, D. C.
October 25, 1952

Mr. L. E. Eady, Director
Administrative Management
Federal Mediation and Conciliation Service
Department of Labor Building, Room 3413
Washington 25, D. C.

Dear Mr. Eady:

Your letter dated September 10, 1952 containing certain alleged charges against me has been received. Also your letter dated September 29, 1952 advising that the Service has made an adverse decision in my case. Further, I wish to acknowledge your letter dated October 10, 1952 advising that any additional information in my case is to be submitted by October 27, 1952 and advising that the proposed date of separation is extended to November 14, 1952.

The reason for my delay in answering your correspondence is due to my present illness. I am under the care of Dr. E. Stuart Lyddane, 3066 Que Street, N. W. You were so advised by Leonard P. Walsh on October 7, 1952 and I believe he forwarded a memorandum from the doctor advising that I was under his care. I also submit an additional memorandum dated October 23, 1952 advising that I am still under the care of Dr. Lyddane.

As you are aware from my record, I have been in the Federal

Mediation and Conciliation Service for a period of approximately 14 years. During the latter part of 1951 and 1952 I have had a great many personal happenings which were outside of my work and were purely personal in nature. These events caused great worry, strain and anxiety to build up over a period of time. For your information they pertain to a long and serious illness of my mother with a resulting financial strain. My mother has passed away.

My wife's mother, Mrs. Elizabeth Barnette, resided but a half a block from our home, her home being at 3916 Benton Street, N. W. Mrs. Barnette suffered a stroke and had a serious heart condition which confined her to her bed for approximately a two year period. Naturally, my family was very close to the situation and the majority of decisions regarding finances, etc., were made by me. The fact that Mrs. Barnette was in poor health over a long period of time was one of the main reasons why my wife was not with me in my assignments out of the City of Washington. Mrs. Barnette also passed away and there are but a few remaining details to attend to so far as her estate is concerned.

The charges filed in this matter are serious in their nature, but I do feel that written down in a cold manner accentuates their seriousness and I do feel that with a presentation of extenuating circumstances that it explains to a great extent my mental and physical condition resulting from my situation and undoubtedly reflected on my efficiency during this period of time.

I am under the care of Dr. Lyddane and he has given me a complete physical examination. He has not as yet given me a complete report but when same is written it will be forwarded to you immediately.

In conclusion I request that the Service review the proposed decision in this case and that I be reassigned for work in the Service and placed on sick leave status until I am released by my physician.

Respectfully submitted,

John T. Daly

30 [Filed July 20, 1954]

(Plaintiff's Exhibit No. 3)

FEDERAL MEDIATION AND CONCILIATION SERVICE
Washington 25, D. C.

November 14, 1952

Registered
Return Receipt Requested

Confidential

Mr. John T. Daly
3434 - 39th Place, N. W.
Washington, D. C.

Dear Mr. Daly:

This will acknowledge receipt of your letter of October 25, 1952, in answer to the charges preferred against you in our letter of September 10, 1952, as amended by our second letter dated October 10, 1952.

The answers and evidence you have submitted in reply to the charges have been fully considered and do not warrant your retention in the Service. Based on the charges furnished you September 10, 1952, you will be separated from your position as Commissioner of Conciliation, GS-13, effective as of the close of business Friday, November 14, 1952.

Your credentials, travel identification card and other government property may be mailed directly to this office or delivered to me personally. Your final salary check and lump sum payment will be withheld pending receipt of the items officially charged to you.

This is an adverse decision taken in accordance with the procedural requirements of Section 14 of the Veterans Preference Act. You have the right to appeal this adverse decision to the U. S. Civil Service Commission not later than 10 days after the effective date of the action, November 14, 1952. Your appeal, if any, should be addressed to:

Chief Law Officer
U. S. Civil Service Commission
Washington 25, D. C.

Very truly yours,

/s/ L. E. Eady
L. E. Eady, Director
Administrative Management

31 [Filed July 20, 1954]
(Plaintiff's Exhibit No. 4)

DISTRICT OF COLUMBIA )
CITY OF WASHINGTON ) SS

Before me, W. Peters Hepburn, Jr., Investigator of the U. S. Civil Service Commission, duly authorized to administer oath, personally appears John T. Daly of 2439 39th Place, N. W., Washington, D. C. who deposes and says:

Relative to charges contained in letter of September 10, 1952 from L. E. Eady, Director, Administrative Management, Federal Mediation and Conciliation Service, to me, I deny Charge 1 alleging that I could not be located on April 3, 1952 when I was needed to service the Food Fair A&P Stores, a situation which had been assigned me. I was available in my room at the Adelphia Hotel on that date.

I deny that I informed the Regional Director by telephone that I was meeting with the parties involved in the Food Fair situation. I did not say that I was meeting with them at that particular time. I have no recollection of informing the Regional Director of that.

I deny that at 3:15 p.m. on that day I telephoned the Regional Director and informed him I was meeting with Representative Mullen of the A&P Stores.

My indications to the Regional Director at 5:30 p.m., and my actions previously that day were only toward the fact that I had been in contact with the parties and was awaiting the proper time which was not that day in my opinion. There has always been a certain amount of discretion as to the proper time for such meetings. My actions were that I was there and available and in contact with the situation. It was in a waiting status waiting for the parties to get together.

I deny the allegation in Paragraph 2. I was not under the influence of intoxicants August 26, 1952, and I was in condition to work.

In regard to the charges of Paragraph 3, I wish to state that I was never arbitrarily unavailable for assignments. I reported to my office in New York every day.

We were required to work a 9 to 5:30 day, but our hours varied and many times we were required to work at night and over week ends. The practice of reporting late to work was not new.

I believe I had been on vacation from August 4, 1952 to August 18, 1952 and believe I returned to the office from vacation on August 18th. The Regional Director was familiar with the fact that I was on leave, and I was available on August 18 to service cases previously assigned to me. It is possible that I did not get into the office until 12:30. I had been at the shore and had to have a change of clothing for the following two weeks work in the office in New York, and I had to obtain these from my home in Washington, D. C.

On August 18, 1952 the Regional Director and I did discuss the subject of office hours and the situation where we worked odd hours. On August 25, 1952, I arrived in the office at 12:30. I had no intention of disregarding the Regional Director's instructions. It was an unintentional violation of his instructions.

32 The charge that I delayed reporting dispute cases and that there were omissions in my reports is a general charge, and I deny same in its entirety. I made my reports as the situations arose. I do not recall any discussions with the Regional Director on this account in our conversation of August 18, 1952. The records speak for themselves.

Since the allegations in the letter of charges are denied by me, with the single exception of one unintentional tardiness, I believe the action taken in separating me from the service is not warranted. I have been in the service for approximately 14 years, during which time I held the position of Regional Director and other responsible positions. I feel that my record of service will speak for itself.

I deny that I have been intemperate or that my work has not been satisfactory and I desire that a full investigation be made of the charges brought.

I was reduced in grade in January, 1952 and again in June, 1952. I did not appeal these reductions as I was not informed that I had such right until after the time limit had expired.

On or about October 7, 1952 the Washington Office was officially advised of my illness by letter from Leonard P. Walsh in which he enclosed a medical statement from Dr. E. Stuart Lyddane. It is my further thought that I requested and signed a request for sick leave on or about October 5, 1952.

On October 25, 1952 I wrote Mr. L. E. Eady, Director, requesting that I be given sick leave status to continue until such time as I was released by Dr. Lyddane. This requested action was denied.

I request a personal hearing.

I have read the above statement in two pages, all of which is true and correct to the best of my knowledge and belief.

Signed John T. Daly

Subscribed and sworn to before
me at Washington, D. C. this
24th day of December, 1952.

/s/ W. Peters Hepburn, Jr.
Investigator, U. S. Civil Service
Commission.

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33 [Filed July 20, 1954]

(Plaintiff's Exhibits Nos. 5 and 6)

United States Civil Service Commission
Washington 25, D. C.

File BAR:JGC:mfj

March 5, 1954

Mr. Leonard P. Walsh
Attorney at Law
910 Seventeenth Street, N. W.
Washington, D. C.

Dear Mr. Walsh:

Reference is made to your appeal in behalf of Mr. John T. Daly from the decision of the Board of Appeals and Review in sustaining, under Section 14 of the Veterans' Preference Act, the decision of the Chief Law Officer, relative to Mr. Daly's demotion on June 2, 1952 and his removal

effective November 14, 1952.

The Commissioners, after careful consideration of your representations and all information developed in connection with the case, have determined that Mr. Daly's removal from the position of Commissioner of Conciliation, grade GS-13, by the Federal Mediation and Conciliation Service, effective November 14, 1952 was warranted, and that Mr. Daly did not exercise his right of appeal of the demotion action of June 2, 1952 within a reasonable time after receipt of the agency letter of August 5, 1952. Accordingly, the decision of the Board of Appeals and Review is affirmed.

By direction of the Commission:

Sincerely yours,

/s/ John E. Blann
John E. Blann, Chairman
Board of Appeals and Review

---

United States Civil Service Commission
Washington 25, D. C.

File BAR:JGC:NM

March 5, 1954

Mr. Leonard P. Walsh
Attorney at Law
910 Seventeenth Street, N. W.
Washington, D. C.

Dear Mr. Walsh:

Reference is made to your appeal in behalf of Mr. John T. Daly from the decision of the Chief Law Officer in sustaining, under Section 14 of the Veterans' Preference Act, the action of the Federal Mediation and Conciliation Service in removing Mr. Daly from the position of Commissioner of Conciliation, grade GS-13, and also holding that his prior demotion effective June 2, 1952 was not appealable.

The Commissioners, after careful consideration of your representations and all information developed in connection with the case, have determined that Mr. Daly's removal from the position of Commissioner

of Conciliation, grade GS-13, by the Federal Mediation and Conciliation Service, effective November 14, 1952 was warranted, and that Mr. Daly did not exercise his right of appeal of the demotion action of June 2, 1952 within a reasonable time after receipt of the agency letter of August 5, 1952. Accordingly, the decision of the Chief Law Officer is affirmed.

By direction of the Commission:

Sincerely yours,

/s/ John E. Blann
John E. Blann, Chairman
Board of Appeals and Review

CORRECTED COPY (March 31, 1954)

JEB 3/31/54

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35 [ Filed July 20, 1954]

(Plaintiff's Exhibit No. 7)

March 31, 1954

Mr. John E. Blann, Chairman
Board of Appeals and Review
U. S. Civil Service Commission
Washington, D. C.

FILE: BAR:JGC:mfj

REQUEST FOR REHEARING

Dear Mr. Blann:

I am in receipt of your letter of March 5, 1954, in which you inform me that the Commission has sustained the decision of the Board of Appeals and Review on my demotion of June 2, 1952 and subsequent removal on November 14, 1952 upon charges dated September 10, 1952. However, on March 11, 1954, I accompanied Mr. Gillespie to the Commission where he saw Mr. Clements for the purpose of obtaining a copy of the decision of the Board of Appeals and Review. Mr. Gillespie informs me that Mr. Clements suggested to him that he confer with you on this topic. Mr. Gillespie further informs me that you examined your letter to me of March 5, 1954 and thereupon told him that the reference in your letter to such a decision was an inadvertence and that no decision had been made by the Board in my case. Also, that you informed Mr. Gillespie that you

would direct a letter to Mr. Walsh to that effect. I am informed that Judge Walsh's former office has not received such a letter. I do not intend these recitations as critical of you or your office but we rather expected to have the letter.

Actually, prior to your letter of March 10, 1954, I had conferred with a close lawyer friend of mine who had Mr. Walsh's file for several days. He concluded that he should not appear in my case essentially by reason of his view that this field of practice was unfamiliar to him. I am enclosing a letter designating Counsel which is self-explanatory.

Mr. Gillespie informs me, after many long conferences, that, in his opinion, my case presents several substantial questions of law and these, in effect, based upon procedural defects in my demotion and subsequent removal. As far as we have been able to determine some of them have not been decided by our Courts and may not likely have arisen before the Commission. As you know, I am required to exhaust my administrative remedies before I can raise them before the Court. You are doubtless familiar with the Ward case in our Court of Appeals, No. 11537, where Judge Baselon reversed and remanded the case for the "administrative determination of the issue involved in the first instance."

I would deeply appreciate your consideration of this request for a rehearing.

Respectfully yours,
/s/ John T. Daly

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36 [Filed July 20, 1954]
(Plaintiff's Exhibit No. 8)

United States Civil Service Commission
Washington 25, D. C.

April 2, 1954

FILE: BAR:JGC:NM

Mr. Rees B. Gillespie
Shoreham Building
Washington, D. C.

Dear Mr. Gillespie:

Pursuant to instructions received from Mr. John T. Daly that you have been designated as his attorney, succeeding Leonard P. Walsh, Esquire, we are placing in your hands a corrected copy of our letter of March 5 addressed to Mr. Walsh in connection with Mr. Daly's case.

You will note that the decision in Mr. Daly's case is the result of an appeal to the Commissioners and is issued "by direction of the Commission." This decision exhausts Mr. Daly's administrative remedies.

Sincerely yours,

/s/ John E. Blann

John E. Blann, Chairman
Board of Appeals and Review

Enclosure 1823

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37 [Filed July 20, 1954]

(Plaintiff's Exhibit No. 9)

FMCS Form AP-17
(December 1950)

FEDERAL MEDIATION AND CONCILIATION SERVICE
Report of Performance Rating

Name Daly, John T. Period of Rating 12-30-50-9-30-51

Position Title Regional Director Grade GS-15 Official Station Philadelphia, Pa.

Instructions to Rating Officials:

Read carefully instructions and procedure pertaining to Performance Ratings.

Refer to FMCS Form AP-18 (Report of Interim Review) and enter for each Task one of the Rating Symbols described below:

Rating Symbols:

O - Outstanding

To be accorded only when all aspects of performance on the Task not only exceeds normal requirements but are so outstanding as to deserve special commendation.

S - Satisfactory

To be given when performance meets minimum requirements but does not deserve special recognition.

U - Unsatisfactory

To be given when performance does not meet minimum requirements.

| Tasks: | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 |
|---|---|---|---|---|---|---|---|---|---|---|
| | S | S | S | S | S | S | | | | |

**For Use by Rating Official** **For Use by Performance Rating Committee**

Adjective Rating Satisfactory
(See instruction on reverse)

Committee Approval Date Apr 28 1952

Signature of Rating Officer /s/ J. W. Green

Signature of Committee Chairman /s/ John E. Dietz

Title of Rating Officer Associate Director

Title _____

Date of Rating 1-11-52

Date of Notice to Employee May 8 1952

Appeal may be made from this rating within thirty days (See Field Memorandum 186)

Employee Copy

38 [Filed July 20, 1954]

(Plaintiff's Exhibit No. 10)

EXCERPTS-HOLBROOK AFFIDAVIT

"At approximately 3:15 PM Commissioner Daly called the Regional office, and at my request, Miss Mary Barrett, my Secretary, took notes of the conversation on a telephone extension in her office."

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"I then called the office of Mr. Poole, Vice President of the Amalgamated Meat Cutters Union, AFL. Miss Witcombe, Mr. Poole's Secretary, informed me that Mr. Poole was at that time meeting in his office with the negotiating committee of the union involving the Food Fair Company situation and that Commissioner Daly was not with them. Miss Witcombe informed me that Commissioner Daly had called that morning for Mr. Poole who was unavailable and that Commissioner Daly said he would call back at noon but that he had not done so. I then called Mr. Jules Schwartz, Labor Relations Director for the Food Fair Company who informed me that Commissioner Daly had been in touch with him by telephone that afternoon and inquired as to the status of their negotiations but had made no plans with them for any meeting."

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39 [Filed July 20, 1954]

(Plaintiff's Exhibit No. 11)

EXCERPTS-BARRETT AFFIDAVIT

"On April the 3rd, 1952, at approximately 3:15 PM, Mr. Holbrook buzzed my office once, which was the signal to use the extension phone in order to record a telephone conversation. At the signal, I picked up the receiver of the extension phone and started taking notes. The conversation was between Commissioner Daly and Mr. Holbrook."

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"Attached is a copy of the memorandum for the record submitted to Mr. Holbrook which was prepared by me from my stenographic notes immediately following the telephone conversation. This memorandum for the record is dated April 3, 1952, the original of which is maintained in our regional confidential file.

"I have read the foregoing statement consisting of this and one other page. I fully understand this statement and same is true and correct to the best of my knowledge and belief, and is made of my own free will without threat, promise or inducement, I have been given an opportunity to make corrections. I am aware that this statement is not given in confidence but may be used at the discretion of the Civil Service Commission."

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40 [Filed July 27, 1954]

JOHN T. DALY, )
Plaintiff, )
v. ) Civil Action No. 1897-54
WHITELY P. McCOY, Director )
Federal Mediation & Conciliation )
Service, et al., )
Defendants )

ANSWER TO AMENDED COMPLAINT

First Defense

The complaint fails to state a claim upon which relief may be granted.

Second Defense

Answering specifically the numbered paragraphs of the complaint, defendants aver:

1. Defendants are not required to answer the allegations contained in paragraph 1 of the amended complaint.

2. Defendants admit the allegations contained in the first three sentences of paragraph 2 of the amended complaint. Each and every other

allegation contained in paragraph 2 is denied.

3., 4, 5, 6, 7, and 8. Admitted.

9. Defendants admit the appointment of plaintiff as a Commissioner of Conciliation at or about the time alleged but deny the remaining allegations contained in the first sentence of paragraph 9 of the amended complaint. Defendants admit the allegations contained in the second sentence of paragraph 9 of the amended complaint. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allega-
41 tions contained in the third sentence of paragraph 9 of the amended complaint. Further answering, defendants state that a letter dated September 29, 1952 (Defendants' Exhibit No. 1, attached hereto and made a part hereof), addressed to plaintiff from the Chief Law Officer, Civil Service Commission, informed plaintiff that because he had not answered the charges against him an adverse decision had been reached and that plaintiff would be separated from his position effective October 10, 1952. Thereafter on October 10, 1952, a second letter (Defendants' Exhibit 2, attached hereto and made a part hereof), addressed to plaintiff from the Civil Service Commission informed plaintiff that because of representations made by plaintiff's attorney to the Civil Service Commission, the time within which plaintiff might reply to the charges made against him was enlarged and also the date of proposed separation from duty was extended.

Defendants admit that plaintiff was refused reinstatement; that plaintiff's separation was affirmed on March 25, 1953; that plaintiff appealed said decision; that the decision of the Chief Law Officer was affirmed; that a request for rehearing was filed and denied; that plaintiff was separated from the position on November 14, 1952. The remaining allegations contained in paragraph 9 are immaterial and do not, therefore, require answer, but if answer be required then each and every allegation is denied.

10. Defendants deny each and every allegation contained in paragraph 10 of the amended complaint, and further answering, defendants aver that the plaintiff was properly discharged and that the procedures

required by statute and regulation were fully complied with.

11. Defendants deny each and every allegation contained in paragraph 11 of the amended complaint.

12. Defendants aver that the allegations contained in paragraph 12 of the amended complaint are immaterial and, therefore, do not require answer, but if answer be required defendants deny the allegations contained therein.

42 13. Defendants aver that the allegations contained in paragraph 13 of the amended complaint are immaterial and do not, therefore, require answer, but if answer be required defendants deny the allegations contained therein.

14. Defendants aver that the allegations contained in paragraph 14 of the amended complaint state conclusions of law and do not, therefore, require answer, but if answer be required defendants deny the allegations contained therein.

15. Defendants aver that the allegations contained in paragraph 15 of the amended complaint state conclusions of law, and do not, therefore, require answer, but if answer be required, defendants deny the allegations contained therein, except defendants admit that plaintiff was separated from his position on November 14, 1952.

16. Defendants aver the allegations contained in paragraph 16 of the amended complaint are immaterial and do not, therefore, require answer, but if answer be required defendants deny the allegations contained therein.

WHEREFORE, defendants having fully answered the allegations contained in the complaint, demand judgment together with the costs of this suit.

/s/ Leo A. Rover
United States Attorney

/s/ Oliver Gasch
Assistant United States Attorney

/s/ Frank H. Strickler
Assistant United States Attorney

/s/ Joseph A. Rafferty, Jr.
Assistant United States Attorney

43 (CERTIFICATE OF SERVICE)

44 [Filed July 27, 1954]

(Defendants' Exhibit No. 1)

September 29, 1952

CONFIDENTIAL

Mr. John T. Daly
2439 - 39th Place, N. W.
Washington, D. C.

Dear Commissioner Daly:

This refers to our letter of September 10, 1952 which advised you that the Service was proposing to take adverse action in your case by separating you from the Service, which provided you in detail with the specific charges against you, and which offered you an opportunity to reply to the charges not later than fifteen days after receipt of our letter.

No reply to our letter of charges has been received from you. This is an official notice of our adverse decision in your case. Based on the charges furnished you September 10, 1952, you will be separated from your position as Commissioner of Conciliation, GS-13, effective as of the close of business Friday, October 10, 1952.

You have the right to appeal this adverse decision to the United States Civil Service Commission not later than ten days after the effective date of the action, October 10, 1952. Your appeal, if any, should be addressed to:

Chief Law Officer
United States Civil Service Commission
Washington 25, D. C.

Very truly yours,

L. E. Eady
Director
Administrative Management

45 [ Filed July 27, 1954]

(Defendants' Exhibit No. 2)

October 10, 1952

Registered -
Return Receipt Requested

Confidential

Mr. John T. Daly
2434 39th Place, N. W.
Washington, D. C.

Dear Mr. Daly:

This refers to our letter of September 29, 1952, advising you that the Service had made an adverse decision in your case and did intend to separate you as of close of business today, October 10, 1952, because of the charges delivered to you September 10, 1952.

On the basis of representations made to us by your attorney, Leonard P. Walsh, we are extending the proposed date of separation and are officially informing you that you will be terminated from the position of Commissioner of Conciliation, GS-13, as of close of business November 14, 1952. During the intervening time, you will be maintained on the rolls in duty status on annual leave.

We shall be glad to consider any additional information you may desire to submit to us provided that such information is received no later than Monday, October 27, 1952.

Very truly yours,

L. E. Eady, Director
Administrative Management

Copy to Mr. L. P. Walsh

46 [Filed January 29, 1955]

JOHN T. DALY, )
Plaintiff )
vs. ) Civil Action No. 1897-54
WHITELY P. McCOY, et al., )
Defendants )

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of this Court, plaintiff moves the Court to enter summary judgment for the plaintiff for the relief demanded in his Amended Complaint for Declaratory Judgment and Affirmative Relief on the ground that there is no genuine issue as to any material fact in this cause of action and that the plaintiff is entitled to judgment, as a matter of law, as apparent from the pleadings, Affidavits, Exhibits and Brief in support of this motion attached hereto and made a part hereof.

/s/ Rees B. Gillespie,
Attorney for plaintiff,
Shoreham Building,
Washington, D. C.

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47 [Filed January 29, 1955]
(Plaintiff's Exhibit No. 11A)

JOHN T. DALY, )
Plaintiff )
vs ) Civil Action No. 1897-54
WHITELY P. McCOY, et al., )
Defendants )

AFFIDAVIT OF MISS MARY M. BARRETT

State of Pennsylvania )
County of Philadelphia ) ss:

I, Mary M. Barrett, being duly sworn, make the following statement in answer to questions submitted by Rene Callec, Investigator,

U. S. Civil Service Commission, Third Civil Service Region, in connection with the appeal of John T. Daly from separation as Commissioner of Conciliation, Grade GS 13, Federal Mediation and Conciliation Service:

On April 3, 1952, I was employed by the Federal Mediation and Conciliation Service as Secretary to Mr. Paul S. Holbrook, Regional Director, Region 3, Philadelphia, Pa. Mr. Holbrook was my immediate Supervisor and I was acquainted with Commissioner John Daly.

On April 3, 1952, at approximately 3:15 PM, Mr. Holbrook buzzed my office once, which was the signal to use the extension in order to record a telephone conversation. At the signal, I picked up the receiver of the extension phone and started taking notes. The conversation was between Commissioner Daly and Mr. Holbrook.

Mr. Holbrook asked Commissioner Daly if he had done anything on the Food Fair situation. Commissioner Daly replied that he hadn't done anything except check with Jules Schwartz. Mr. Holbrook informed Commissioner Daly that Mr. Shapiro, attorney for the Food Fair had called that morning and inquired as to whether a meeting had been set up by the Federal Mediation Service. Commissioner Daly told Mr. Holbrook that the situation was a serious and complicated one but that it would work itself out--that we shouldn't become too enthusiastic about it. Mr. Holbrook asked, "Suppose it goes on strike?". Mr. Daly replied "Suppose the Food Fair does go down?". "But", Mr. Holbrook said, "you have an assignment on this situation."

Mr. Daly continued by saying that he was meeting with Mr. Mullin of the A & P. Mr. Holbrook asked Commissioner Daly where he was calling from--what was the number of the phone he was using. Commissioner Daly gave the phone number as Rittenhouse 6-3000.

Mr. Holbrook asked, "Is this a separate meeting?". Mr. Daly replied "Yes-with the A & P". Mr. Holbrook continued, "What are they going to do about the 40 hour week." Mr. Daly replied, "It may be money or it may be a reduction in hours".

Mr. Holbrook told Commissioner Daly that he (Mr. Daly) was going to have to call Mr. Shapiro and discuss the matter with him. Commissioner

Daly replied, "It won't go into a strike, Paul, you've got to wait and see how the thing develops." Mr. Holbrook continued, "But we can't wait. They've asked for help and we've got to give it to them." Mr. Daly replied, "All right, We'll set up a meeting."

48 Miss Barrett's affidavit continued:

Attached is a copy of the Memorandum for the Record submitted to Mr. Holbrook which was prepared by me from my stenographic notes immediately following the telephone conversation. This Memorandum for the Record is dated April 3, 1952, the original of which is maintained in our Regional Confidential File.

I have read the foregoing statement consisting of this and one other page. I fully understand said statement and same is true and correct to the best of my knowledge and belief, and is made of my own free will without threat, promise or inducement. I have been given an opportunity to make corrections. I am aware that this statement is not given in confidence but may be used at the discretion of the Civil Service Commission.

(Signed) Mary M. Barrett

Subscribed and sworn to
before me this 23rd day
of January, 1953.

/s/ Rene Callec,
Investigator, US CSC.

(Exhibit c)

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49 [ Filed January 29, 1955]

(Plaintiff's Exhibit No. 12)

JOHN T. DALY, )
Plaintiff )
vs ) Civil Action No. 1897-54
WHITELY P. McCOY, et al., )
Defendants )

# AFFIDAVIT OF PLAINTIFF

District of Columbia, ss:

John T. Daly being duly sworn on oath deposes and says that he is the plaintiff in the above entitled cause and makes this affidavit upon his personal knowledge; that he is a Veteran of World War I; that he was appointed a Commissioner in the Federal Mediation and Conciliation Service on or about September 15, 1938, at a Grade 9, with a salary of $3200.00 annually; that from the date of said appointment to the date of separation on November 14, 1952, he was a classified civil service employee with permanent status, at which time he had a total service in Government of about 18 years; that he has served continuously and satisfactorily in the aforesaid Agency until his separation therefrom, as aforesaid, that during said period of service he received many excellent efficiency ratings and at the time he was separated, as aforesaid, he was then serving with a satisfactory efficiency rating which said rating covered the period from December 30, 1950, to September 30, 1951, that he served as Regional Director at Philadelphia, Pa., for the period from March, 1948, to January 1, 1952; that he was succeeded in said position by Paul S. Holbrook; that at the time of his separation, as aforesaid, he was in Grade GS 13, salary $9360.00 annually; that about a week before the Hearing on March 6, 1953 before Mr. Welch of the Office of the Chief Law Officer of the CSC he saw for the first time the affidavits of Miss Mary M. Barrett and Paul S. Holbrook which were then at that time in his file in the
50 Main Office of the CSC; that this was the first knowledge he had from any source whatsoever that Miss Mary M. Barrett had intercepted and divulged the telephone call he made to said Paul S. Holbrook at about 3:15 PM on April 3, 1952; that he at no time gave his consent to either the interception or said divulgence of the aforesaid telephone conversation; that he had no warning or notice of any kind that Miss Mary M. Barrett was at the time of said telephone conversation engaged in the interception of the said telephone conversation; that he did not know until on or about April 7, 1954 that the aforesaid interception and divulgence of the aforesaid telephone conversation was unlawful and that the first person to inform

him of such was Rees B. Gillespie; that said affidavit of Miss Mary M. Barrett was based upon the aforesaid telephone conversation; that both of the said original affidavits of Miss Mary M. Barrett and Paul S. Holbrook were made in Philadelphia, Pa., on January 23, 1953 and were acknowledged before Rene Callec, Investigator, U. S. CSC; that on or about April 7, 1954, he did accompany Rees B. Gillespie to the Main Office of the CSC where he saw in his file the aforesaid affidavits; that he personally made an excerpt from the original affidavit of said Paul S. Holbrook; that he verified against the original of said affidavit the excerpt he made with Rees B. Gillespie; that his Exhibit 10 attached to his Amended Complaint is a true and correct copy of the part of the original affidavit of said Paul S. Holbrook; that he also verified with Rees B. Gillespie against the original affidavit of said Miss Mary M. Barrett a copy of said original affidavit of Miss Mary M. Barrett; that his Exhibit 11A attached to his Motion for Summary Judgment filed herein is a true and correct copy of the original affidavit of Miss Mary M. Barrett; that he has examined the decision of the Chief Law Officer of the CSC dated March 25, 1953, in the possession of his attorney, Rees B. Gillespie; that on Page 6 thereof the said decision lists a series of affidavits; that his Exhibit 15 attached to said Motion is a true and correct copy of the aforesaid listing of said affidavits taken from said decision; that the letter addresses to him from the Agency dated August 5, 1952 referred to in the decision of
51 the CSC dated March 5, 1954, did not state any reason or reasons for his demotion on June 2, 1952; that his Exhibit 14 attached to said Motion is a true and correct copy of the original now in the possession of his attorney, Rees B. Gillespie.

/s/ John T. Daly

SUBSCRIBED and SWORN to before me a Notary Public this ____(illegible) day of January, 1955.

/s/ Genevieve M. Foreman
Notary Public

My commission expires: September 1, 1957.

52 [Filed January 29, 1955]

(Plaintiff's Exhibit No. 13)

JOHN T. DALY, )

Plaintiff )

vs ) Civil Action No. 1897-54

WHITELY P. McCOY, et al., )

Defendants )

AFFIDAVIT OF REES B. GILLESPIE

Rees B. Gillespie being duly sworn on oath deposes and says that this affidavit is made upon his personal knowledge; that he is attorney for the above plaintiff, John T. Daly, and was employed soon after the decision of the CSC dated March 5, 1954; that on or about April 7, 1954 he discovered in an interview with plaintiff that Miss Mary M. Barrett had intercepted and divulged a telephone conversation plaintiff had with Paul S. Holbrook at or about 3:15 P.M. on April 3, 1954; that at no other time from any other source did he have such knowledge; that he went to CSC with plaintiff and found the affidavits of Miss Barrett and Mr. Holbrook in plaintiff's file and that he personally copied there the affidavit of Miss Barrett; that he verified with plaintiff the copy he made and the copy of an excerpt plaintiff had made from Mr. Holbrook's affidavit; that plaintiff's Exhibits 10 and 11A are true and correct copies of the original affidavits of Miss Barrett and Mr. Holbrook and said affidavits were made in Philadelphia, Pa. on January 23, 1953 and acknowledged before Rene Callec, Investigator, U. S. CSC; that plaintiff's Exhibit 15 is a true and correct copy taken from the decision of the Chief Law Officer of the CSC dated March 25, 1953, which decision is now in his possession.

/s/ Rees B. Gillespie

53 (Plaintiff's Exhibit 14)

JOHN T. DALY, )
Plaintiff )
vs ) Civil Action No. 1897-54
WHITELY P. McCOY, et al., )
Defendants )

Office Memorandum--- United States Government

Confidential

To: John T. Daly, Commissioner
Region 2 - New York City

Date: June 3, 1952

From: L. E. Eady,
Administrative Management

Subject: (blank)

This will confirm conversations with you in the national office and will serve to confirm your transfer to the Second Region, effective Monday, June 2, 1952. Effective on this date your official station will be New York City and this station assignment will continue for the next sixty to ninety days, or until such time as your Regional Director may recommend and the Placement Committee may approve a further transfer of official station within the Second Region.

Upon entrance on duty in New York City, you will be reclassified from Grade GS 14 to Grade GS 13 at a salary level of $9360.00, which gives full credit for all service at GS 13 and above from the time you first acquired that Grade.

For a period of twelve months you will be on probation.* Your conduct and performance will be subject to review by the Placement Committee and if unsatisfactory further action will be considered by the Committee.

This transfer and reassignment has been authorized as being advantageous to the Government and, therefore, the cost of moving household goods in accordance with existing laws and regulations may be authorized for payment from appropriated funds. Such expense may not however be incurred prior to July 1st, 1952.

(Signed) L. E. Eady

*Underscoring supplied

54 [Filed January 29, 1955]

(Plaintiff's Exhibit No. 15)

JOHN T. DALY, )
Plaintiff )
vs. ) Civil Action No. 1897-54
WHITELY P. McCOY, et al., )
Defendants )

EXCERPT FROM THE DECISION OF THE CHIEF LAW OFFICER, OF CSC, BEING PARAGRAPH 4, ON PAGE 6, DATED MARCH 25, 1953.

"In support of the three charges and specifications there was considerable evidence developed in the Commission's investigation and during the hearing as outlined hereinafter.

Charge 1. Incidents in Philadelphia, Pennsylvania.

Affidavits of Paul S. Holbrook, Regional Director, Philadelphia, Abe K. Kaplan, Administrative Assistant, Washington, John R. Murray, Commissioner, Philadelphia, Mary M. Barrett, Secretary, Philadelphia, and Mary Recknor, Clerk Stenographer, Philadelphia.

In addition a memorandum pertinent to the incident on April 3, 1952, was made by Mary M. Barrett, 'For the Record' on the same date."

55 (CERTIFICATE OF SERVICE)

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56 [Filed March 14, 1955]

JOHN T. DALY )
Plaintiff )
v. ) Civil Action No. 1897-54
WHITELY P. McCOY, et al., )
Defendants )

## MOTION FOR SUMMARY JUDGMENT

Come now the defendants by their attorney, the United States Attorney, and move this Honorable Court for a summary judgment and for reasons therefor aver that on the basis of defendants' Exhibits 1 and 2, attached hereto and made a part hereof, there is no material issue of fact and defendants are entitled to judgment as a matter of law.

/s/ Leo A. Rover
United States Attorney

/s/ Oliver Gasch
Assistant United States Attorney

/s/ Frank H. Strickler
Assistant United States Attorney

/s/ Joseph A. Rafferty, Jr.,
Assistant United States Attorney

(CERTIFICATE OF SERVICE)

57 (CERTIFICATE OF SERVICE)

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58 [Filed March 14, 1955]

(Defendants' Exhibit No. 1)

I certify that the attached photostats, consisting of nine pages, include a copy of a letter dated March 25, 1953, addressed to John T. Daly, a copy of the initial decision on appeal in Mr. Daly's case signed by the Chief Law Officer, and a copy of the letter of March 5, 1954, setting forth the Commissioners decision in Mr. Daly's appeal, are true copies of records on file in the Civil Service Commission and that I have legal custody of such records.

/s/ William C. Hull
Executive Assistant to the Commissioners
United States Civil Service Commission
Washington, D. C.

July 1, 1954

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59

BAR:JGC:mfj

March 5, 1954

Mr. Leonard P. Walsh
Attorney at Law
910 Seventeenth Street, N. W.
Washington, D. C.

Dear Mr. Walsh:

Reference is made to your appeal in behalf of Mr. John T. Daly from the decision of the Board of Appeals and Review in sustaining, under Section 14 of the Veterans' Preference Act, the decision of the Chief Law Officer, relative to Mr. Daly's demotion on June 2, 1952 and his removal effective November 14, 1952.

The Commissioners, after careful consideration of your representations and all information developed in connection with the case, have determined that Mr. Daly's removal from the position of Commissioner of Conciliation, grade GS-13, by the Federal Mediation and Conciliation Service, effective November 14, 1952 was warranted, and that Mr. Daly did not exercise his right of appeal of the demotion action of June 2, 1952 within a reasonable time after receipt of the agency letter of August 5, 1952. Accordingly, the decision of the Board of Appeals and Review is affirmed.

By direction of the Commission:

Sincerely yours,

John E. Blann, Chairman
Board of Appeals and Review

cc: Mr. John T. Daly
2439 39th Place, N. W.
Washington, D. C.
cc: Mr. L. E. Eady
Dir., Administrative Management
Federal Mediation and Conciliation Service
Washington, D. C.
Attn: Mr. Walter A. Maggielo
General Counsel
cc: Chief Law Officer
cc: Service Record Division (DOB 6/12/98)

60

CL:JC (illegible)

March 25, 1953

Mr. John T. Daly
2439 39th Place, N. W.
Washington, D. C.

Dear Mr. Daly:

There is transmitted herewith a copy of my findings and recommendation in the Section 14 Veterans' Preference Act appeal described below:

Appeal of: John T. Daly

Action appealed: Discharge effective November 14, 1952.

Employing Agency: Federal Mediation and Conciliation Service, Washington, D. C.

Decision: Discharge affirmed.

There is also enclosed herewith a copy of the transcript of the hearing held in the Commission on the appeal.

For the Commission:

Very respectfully,

L. V. Meloy
Chief Law Officer

Enclosure 2925.

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61

UNITED STATES CIVIL SERVICE COMMISSION
OFFICE OF THE CHIEF LAW OFFICER
WASHINGTON 25, D. C.

CL:JCW:KR:LVM:mm

APPEAL OF JOHN T. DALY

UNDER SECTION 14 OF THE VETERANS' PREFERENCE ACT OF 1944, AS AMENDED

Appeal of a discharge effective November 14, 1952, from the position of Commissioner of Conciliation, GS-13, $9,360. per annum, from the Federal Mediation and Conciliation Service, Washington, D. C.

## INTRODUCTION

Leonard P. Walsh, Esquire, Attorney at Law, submitted a Section 14 appeal to the Commission in behalf of Mr. Daly by a letter dated November 21, 1952, relative to the discharge and the appeal was thereafter docketed for investigation and adjudication. Investigations were conducted in Washington, Philadelphia and New York and considerable information obtained of pertinent official records of the agency with affidavits of officials and employees. An affidavit was also obtained from Mr. Daly in which he requested a hearing. Following completion of the investigation, a hearing was conducted in Washington and attended by the appellant, his attorney, and officials of the agency.

The official records of the agency show that the proceeding against Mr. Daly in connection with his discharge is under the provisions of Section 14 and the Commission's Regulations pursuant thereto. On September 10, 1952, Mr. L. E. Eady, Director, Administrative Management, transmitted a letter to Mr. Daly of advance notice of proposed separation which is quoted in its material parts below:

"1. Dereliction of duty, failure to service an assigned case, and giving false information to the Director of Region 3 at the time you were stationed in Philadelphia, Pennsylvania. Specifically, it is alleged that:

a. On the morning of April 3, 1952, you could not be located by the Regional Director when you were needed to service the Food Fair - A & P Stores situation which had been assigned to you.

b. At 1:30 P.M. that day, you falsely informed your Regional Director by telephone that you were meeting with the parties involved in the Food Fair situation.

c. At 3:15 P.M. that day, you telephoned your Regional
62 Director and falsely informed him you were meeting with representative Mullin of the A & P Stores.

d. When you personally reported to your Regional Director at 5:30 P. M. that day, you compounded your falsification by alleging that you informed him only that you were "in contact" with the parties; upon presentation of proof by him that you had no contact with the parties that

day, you could not explain your action for that day.

"2. You have a habit of intemperance that has seriously interfered with your work performance as a representative of the Service. Specifically, it is alleged that despite the fact that the Associate Director discussed this aspect of your conduct fully with you on April 9, 1952, and despite your promises to improve your conduct, on August 26, 1952, while on duty to New York City, the Director of Region 2, at 2:30 P.M., found you slumped over your desk, awakened you, and found you apparently under the influence of intoxicants and in no condition to work.

a. On many Monday mornings, and particularly on Monday, August 18, 1952, you had not previously reported your whereabouts to the Regional Director and were not available to service a case previously assigned you.

b. Despite the fact that upon your arrival in the office on Monday, August 18, 1952, at 12:30 P. M., the Regional Director informed you that your habit of taking the morning train from your home in Washington, D. C. and arriving tardy in the office was not acceptable and should be stopped, you disregarded his instructions and on the following Monday, August 25, 1952, you reported for duty at 12:30 P.M.

c. The omissions in such reports as you made and your delays in reporting dispute cases were in disregard of Service policy and procedure, and you were so informed by the Director of Region 2 on August 18, 1952.

"As a result of your misconduct and failure to perform satisfactorily the duties of your office while stationed in Philadelphia, Pennsylvania, you were placed on probation and transferred to New York City. It is apparent that you have failed to comply with the terms applicable to your service during the probationary period and, therefore, it has been determined that you can no longer satisfactorily perform the duties of a Commissioner of Conciliation and should be separated from the Service."

The above letter advised Mr. Daly of his right to answer within fifteen calendar days after its receipt and that he would be retained on an
63 active duty status during the notice period. Mr. Daly did not reply in

writing to the foregoing notice and in a letter of September 29, 1952, he was notified of the decision to effect his separation on October 10, 1952, and informed of his right to appeal to the Civil Service Commission under Section 14. In a letter dated October 7, 1952, Attorney Walsh requested an extension of the date of separation by the agency stating that Mr. Daly was under medical care. This extension was granted to November 14, 1952, and Mr. Daly and his attorney duly notified and informed that any additional information submitted by October 27, 1952, would be considered. Mr. Daly replied by letter of October 25, 1952, referring to the previous correspondence regarding the matter. The letter mentioned his service with the agency for fourteen years, personal incidents in his private life causing worry, strain and anxiety, including long, serious illnesses of his mother and mother-in-law, and his own health. Relative to the charges he stated as follows:

"The charges filed in this matter are serious in their nature, but I do feel that written down in a cold manner accentuates their seriousness and I do feel that with a presentation of extenuating circumstances that it explains to a great extent my mental and physical condition resulting from my situation and undoubtedly reflected on my efficiency during this period of time."

On November 14, 1952, the agency notified Mr. Daly that the evidence in the case and his answer had been fully considered with the conclusion that his retention in the service was not warranted, and his separation would be effected as of the close of business that same day.

The information developed in connection with the appeal, including the reports of investigations, transcript of the hearing conducted by the Commission, copies of the records from the agency, memoranda, documents, submissions of the parties and correspondence, is in the Commission's appeal file which has been, and is presently, available for inspection by the parties, and all matters therein were duly considered in connection with the adjudication of the case.

## ANALYSIS AND FINDINGS

It is established from the information in the Commission's appeal

file that the appellant was a preference eligible employee within the meaning of Section 14 of the Veterans' Preference Act of 1944, at the time of his discharge and hence, entitled to the benefits of the law and Regulations of the Commission pursuant thereto, including the right of appeal to the Commission.

Considering the proceedings of the agency in connection with the discharge, it appears that the procedural requirements of Section 14 and the Commission's Regulations were fully complied with and the discharge is valid to this extent.

64 During the hearing on the appeal, counsel for the appellant referred to charges in the letter of proposed adverse action as being specific in some respects and general in regard to the specific charge as to his availability for duty on April 3, 1952, which is mentioned in charge No. 1. It was also pointed out that the date of an alleged incident of intoxication mentioned in charge No. 2 was an error; and that the correct date was August 22, rather than August 26, as stated therein. The letter of proposed action and its contents has been reviewed and it is found that the reasons stated therein are specific and in sufficient detail so that the appellant was in a position to clearly understand the particular offenses charged against him. Accordingly, he was not prejudiced in submitting his defense and the notice is not defective in this connection.

Counsel for the appellant further alleges that a change to lower grade and headquarters of Mr. Daly on June 2, 1952, from the position of Commissioner, GS-14, $10,200. p.a., Washington, D. C. to Commissioner, GS-13, $9,360. p.a., New York, N. Y., violated the procedural requirements of Section 14 and the Commission's Regulations; that the reduction is indirectly related to his discharge on November 14, 1952; and that if proper action had been taken by the agency in the June 2, 1952 transaction, the previous events could have been cleared up and subsequent events avoided. In other words, that the non-compliance with the law and regulations in the reduction brought about the ultimate separation of Mr. Daly, and there never would have been a separation if the proper procedures had been followed.

Representatives of the agency admitted during the Commission's hearing that there were procedural defects in the reduction of Mr. Daly on June 2, 1952. It was contended, however, that the present question before the Commission relates to an appeal of a discharge and evidence concerning the reduction is irrelevant and immaterial.

The salient facts of the reduction of June 2, 1952, are that there was no written notice of proposed reduction, opportunity to answer or written notice of decision with advice therein as to the right of appeal to the Commission. A letter-memorandum dated June 3, 1952, was directed to Mr. Daly concerning the matter, which referred to previous conversations and confirmed his transfer from Washington to New York on June 2, 1952. There was also a Standard Form Notification of Personnel Action executed on June 2, 1952, which reads that it was in accordance with the letter-memorandum dated June 3, 1952. Subsequently, on August 5, 1952, Mr. Daly was notified by a letter-memorandum of a right to appeal the reduction to the Civil Service Commission under the Veterans' Preference Act of 1944, and referred to the provisions of Part 22 of the Federal Personnel Manual for details. Both of the above letter-memoranda mentioned that Mr. Daly was being placed on probation for a period of one year, and that the matter was subject to review and, if his conduct and performance were unsatisfactory, further action would be considered.

65 In his affidavit executed during the Commission's investigation, Mr. Daly also mentioned that he had been reduced in grade January, 1952; however, during the Commission's hearing he stated that he had served in the position of Regional Director, GS-15, Philadelphia, Pa., up to that time; and that he resigned and accepted the position of Commissioner, GS-14. It was also brought out by his counsel that no issue was being made on the change from GS-15 to GS-14.

Careful consideration has been given to the personnel action of June 2, 1952, and the contentions of the parties in the light of all the facts and circumstances of the case.

Section 14 provides a right of appeal to the Commission from an adverse decision of an administrative officer so acting within a reasonable

time after the date of the receipt of the notice of such adverse decision. Section 22.3 of the Regulations of the Commission pursuant to Section 14 provides that a preference eligible shall be given advice in the notice of adverse decision of his right to appeal to the Commission within ten days after the date the adverse decision becomes effective. It is also provided in Section 22.4 that the time limit on appeals may be extended in the discretion of the Commission upon a showing that the employee was not notified of his right to appeal, as provided in Section 22.3, and was unaware of his rights or that circumstances beyond his control prevented him from filing an appeal within the prescribed ten days.

From the standpoint of the procedural requirements of Section 14, there was an invalid reduction of Mr. Daly followed by a valid discharge and an appeal of the latter. Mr. Daly was placed on probation at the time of the reduction and warned that his conduct and performance, if unsatisfactory, would be subject to review and further action. The agency subsequently considered that his conduct and performance were unsatisfactory, and in the letter of proposed discharge dated September 10, 1952, cited incidents both prior and subsequent to the reduction. The fact of the reduction did not preclude consideration by the agency of the previous incidents in connection with the discharge. Furthermore, it cannot be reasonably concluded that if the proper procedures had been followed in the reduction, the entire matter would have been cleared up and discharge avoided.

Inasmuch as the proper procedures were not followed in the June 2, 1952, reduction, Mr. Daly was not properly notified of his right to appeal. He was, however, later notified to this effect on August 5, 1952, but did not submit an appeal. In explanation of his failure to appeal, he states that the time limit had expired when he received the notification. As previously stated Section 14 in the Commission's Regulations provide that an appeal must be submitted to the Commission within a reasonable time. Under the Commission's Regulations ten days after effective date is considered to be a reasonable time, but the time limit may be extended in the discretion of the Commission. If an appeal of the reduction had been

66 made after the notice of August 5, 1952, and before the discharge, the Commission would have been in a position to accept and act on it. The situation is such, however, that there was a long lapse of time and no effort to appeal the matter at any time. As the case presently stands, the issue is now raised indirectly to invalidate a discharge that is valid otherwise as to procedural requirements. There was doubtlessly no intent on the part of Mr. Daly to appeal the reduction although informed of his right in this respect, and he was not prevented from doing so by any circumstances beyond his control.

On the basis of the immediate foregoing analysis it is concluded that the reduction of Mr. Daly is not appealable at this time, and it does not affect the discharge which is under consideration.

Relative to the merits of the case, it appears that Mr. Daly made no denial of the charges and specifications of the agency until after his appeal to the Commission. During the Commission's investigation, he executed an affidavit and generally denied all matters alleged against him. A specific denial was made of the incident as to being under the influence of intoxicants on August 26, 1952 (sic) and in no condition to work; however, it developed during the hearing that this date was not correct and that the incident referred to occurred on August 22, 1952. As previously indicated, Mr. Daly was fully aware of the incident referred to in the charge.

In support of the three charges and specifications there was considerable evidence developed in the Commission's investigation and during the hearing as outlined hereinafter.

Charge 1. Incidents in Philadelphia, Pennsylvania.

Affidavits of Paul S. Holbrook, Regional Director, Philadelphia, Abe K. Kaplan, Administrative Assistant, Washington, John R. Murray, Commissioner, Philadelphia, Mary M. Barrett, Secretary, Philadelphia, and Mary Recknor, Clerk Stenographer, Philadelphia.

In addition a memorandum pertinent to the incident on April 3, 1952, was made by Mary M. Barrett, "For the Record" on the same date.

Charge 2. Incidents in Philadelphia, Pa. and New York, N. Y.

Testimony during the Commission's hearing of James W. Greenwood, Jr., Associate Director, Washington, and Frank Brown, Regional Director, New York.

Charge 3. Incidents in New York, N. Y.

Testimony during Commission's hearing of Frank Brown, Regional Director, Region II, New York.

67 Charges 1, 2 and 3 are also generally supported by the affidavit of L. E. Eady, Director, Administrative Management, Washington, and his testimony during the Commission's hearing.

The pattern of conduct and performance of Mr. Daly in the agency appears to be quite clear from the evidence. As a result, he was transferred and reassigned on several occasions with a view to affording him an opportunity to improve his record. The agency considered him a problem due to his intemperance which affected his performance and reliability, and these matters were discussed with him by officials on a number of occasions. He also denies evidence and testimony as to what was covered in these discussions as to intemperance and unreliability. The evidence, however, is cumulative. There has been criticism of the evidence as being in the nature of hearsay, innuendoes, insinuations and lacking in definiteness, but this is not the situation. There is direct evidence and testimony on the major incidents in the charges and specifications.

On the weight of all the evidence as to the merits of the case, it is concluded that the charges are sustained; that the discharge was for such cause as will promote the efficiency of the service within the meaning of Section 14; and that the personnel action was not arbitrary, unreasonable or capricious.

## RECOMMENDATION

On the basis of all the information in the case, it does not appear that the rights of Mr. Daly as a veteran have been violated or that there was any injustice otherwise in his discharge. It is, therefore, recommended that no change be made in the personnel action of the Federal

Mediation and Conciliation Service in effecting his discharge on November 14, 1952.

No further appeal from this decision will be entertained from either Mr. Daly or the Federal Mediation and Conciliation Service, unless it is submitted to the Commissioners, U. S. Civil Service Commission, Washington, 25, D. C., within seven (7) days after receipt of this decision. Notification of a further appeal should be given to this office so that the case files can be transmitted promptly to the Commissioners.

Since there is no further right to a hearing, additional representations should be made in writing and submitted in duplicate with the appeal to the Commissioners.

/s/ L. V. Meloy
Chief Law Officer

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68 [Filed March 14, 1955]

(Defendants' Exhibit No. II)

JOHN T. DALY )
Plaintiff )
vs. ) Civil Action No. 1897-54
WHITELY P. McCOY, Director )
Federal Mediation & Conciliation Service )
L. E. EADY, Director of Administrative )
Management )
Federal Mediation & Conciliation Service )
PHILIP YOUNG, Chairman )
U. S. Civil Service Commission )
GEORGE M. MOORE, Member )
U. S. Civil Service Commission )
FREDERICK J. LAWTON, Member )
U. S. Civil Service Commission )
Defendants )

AFFIDAVIT

City of Washington :
District of Columbia: ss

William C. Hull, Executive Assistant to the United States Civil Service Commissioners, being first duly sworn according to law deposes and says:

1. He has legal custody and control of the official records of the United States Civil Service Commission, including records of appeal filed with the Commission pursuant to the provisions of Section 14 of the Veterans' Preference Act of 1944, as amended; that he has examined the records relating to the appeal of Mr. John T. Daly, plaintiff herein, and that he is acquainted with the contents thereof.

69 2. On September 10, 1952, plaintiff, then employed as Commissioner of Conciliation, GS-13, with the Federal Mediation and Conciliation Service, was given a thirty (30) day advance written notice of proposed removal for cause under the provisions of Section 14 of the Veterans' Preference Act of 1944, as amended, and fifteen (15) days within which to reply.

3. Mr. Daly failed to reply to the letter of charges of September 10, 1952. Accordingly, under date of September 29, 1952, he was notified that he would be separated at the close of business on October 10, 1952. However, the effective date of removal was extended, at the request of counsel for Mr. Daly.

4. By letter dated November 14, 1952, the Federal Mediation and Conciliation Service notified Mr. Daly of his removal effective at the close of business of that date. Notification of Personnel Action, Form 50, confirms that Mr. Daly's services were terminated at the close of business on November 14, 1952.

5. Mr. Daly thereafter appealed his dismissal to the Chief Law Officer, United States Civil Service Commission. A hearing was accorded Mr. Daly on March 6, 1953, at which he was represented by counsel.

6. On March 25, 1953, the Chief Law Officer affirmed the adverse decision of the Federal Mediation and Conciliation Service, upon a finding of procedural regularity under Section 14 of the Veterans' Preference Act, and upon a further finding that the evidence supported the charges of September 10, 1952.

7. On April 2, 1953, plaintiff further appealed to the Commission and, on March 5, 1954, the Board of Appeals and Review, by direction of the Commission, held on the basis of the evidence adduced that plaintiff's removal was warranted.

70 8. Each of the procedural requirements applicable to removals under Section 14 of the Veterans' Preference Act of 1944, as amended, were observed in effecting Mr. Daly's dismissal. He was given:

(a) A thirty (30) day advance written notice of proposed removal containing a detailed statement of the reasons for the proposed actions.

(b) A reasonable time within which to answer the charges.

(c) An administrative decision.

(d) A hearing on the appeal to the Chief Law Officer of the Commission.

(e) A detailed decision by the Chief Law Officer, and on further appeal, a final decision by the Commission.

/s/ William C. Hull

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71 [Filed April 7, 1955]

JOHN T. DALY )
Plaintiff )
vs. ) C. A. No. 1897-54
WHITELY P. McCOY )
Director, Federal Mediation and )
Conciliation Service, et al )
Defendants )

Washington, D. C.
Monday, March 28, 1955

RULING FROM THE BENCH on MOTION FOR DECLARATORY JUDGMENT, by the Honorable James R. Kirkland, Judge.

* * * * * * *

THE COURT: I am prepared to rule in this matter.

In the case of John T. Daly, plaintiff, vs. Whitely P. McCoy, et al, Civil Action No. 1897-54, there has been filed in this Court a complaint for declaratory judgment and for affirmative relief in connection with the employment of plaintiff as a member of the Federal Mediation and Conciliation Service.

Instances arose on which a set of charges were predicated, but the important thing in the matter is that on April 3, 1952, at 3:15 p.m. one
72 Miss Mary M. Barrett, who was secretary to the supervisor of the plaintiff, listened in on a telephone conversation at approximately 3:10 p.m. The conversation has been made a part of the record through affidavits and by allusion to it in the complaint.

It is quite clear that two of the charges are completely predicated upon that telephone conversation, namely, the conversation that related to contacts with the development of the Food Fair.

With regard to that matter, Title 47, U.S. Code Annotated 605, is clearly in point. Paraphrasing it, the section holds that, "No person receiving and no person not being authorized by the sender shall intercept any communication... or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto..."

The language of the statute is clear that such interception violates the statute. In our own circuit the District Court in the case of United States vs. Stephenson, 121 Fed Supp. 274, decided in 1947, has held that:

"Under this section prohibiting interception of any communication unless authorized by the 'sender' means both parties to that conversation."

The opinion also referred to United States vs. Polakoff, 112 Fed 2d, 888, from the Circuit Court of Appeals, New York, decided in 1940,
73 and certiorari denied, 311 U.S. 653; and the famous case of United States vs. Narone.

United States vs. Coplon, 91 Fed Supp. 867, decided 1950 holds that, "This section relating to unauthorized publication or use of communications is designed to protect an individual who has participated in the intercepted communications."

Also see Reitmeister vs. Reitmeister, 162 Fed. 2d 691, decided in 1947; Weiss vs. United States, 309 U.S. 321; United States vs. Gruber, 123 Fed. 2d 307.

Applying those cases, the Court will hold that the intercepted messages on that date, April 3, 1952, were unlawfully received and may not be made the part of a charge against this particular person.

If this were an indictment, of course, part of it being defective, the whole indictment would be defective. But this is not. It is an administrative proceeding, where an illegal transaction has been used to obtain unauthorized information, which in turn has been used as a set of charges. Accordingly that information is not available in this particular procedure.

The Court is going to hold, therefore, that since both the plaintiff has moved for summary judgment and the defendant has moved for summary judgment, that there is a very material set of facts necessary to be determined first, as to what effect, if any, this intercepted message had
74 upon the ultimate decision, and whether or not there was prejudice shown which was adverse to the plaintiff, and because testimony is necessary, both motions will accordingly be dismissed.

On the other hand, since the matter is administrative, and from the pleadings it is quite apparent -- namely the 13th specification -- that to merely inform an employee that he is guilty of "omissions in such reports as you have made," does violate Section 14 of the Civil Service Regulations with regard to specificity, and does not give the employee sufficient information to defend such charges, accordingly, the Court will refer the matter back to the Civil Service Commission to proceed in due and proper form under the Veterans' Preference Act and the Civil Service Rules and Regulations, and to accord a new hearing and determination, excluding those matters unlawfully received by the wire tap of April 3, 1952, and to make due and proper findings of fact.

75 [Filed October 19, 1955]

JOHN T. DALY, )
Plaintiff )
vs. ) Civil Action No. 1897-54
JOSEPH F. FINNEGAN, et al., )
Defendants )

MOTION FOR REHEARING

Now comes the plaintiff, by his attorney, and files this Motion for a Rehearing upon the Ruling made by the Court herein, and for grounds therefor and in support thereof files the attached brief with exhibit which is made a part hereof.

/s/ Rees B. Gillespie,
Shoreham Building,
Attorney for plaintiff

* * * * * *

85 [Filed October 19, 1955]

JOHN T. DALY, )
Plaintiff, )
vs. ) C. A. No. 1897-54
WHITELY P. McCOY, )
Defendant. )

Washington, D. C.,
Monday, March 28, 1955

EXCERPT OF PROCEEDINGS ON MOTION FOR SUMMARY JUDGMENT before the Hon. James R. Kirkland, Judge:

* * * *

THE COURT: Unfortunately, there is so little in the pleadings. There is a reference to part of the conversation that the plaintiff apparently called in to his superior, and there was something about being in contact with, and that meaning physical contact or actual negotiation, or being aware of, but the entire matter is not reproduced in the pleadings,

and I don't know what the content was. * * *

REPORTER'S CERTIFICATE

Certified to be the official transcript of portions of proceedings indicated in C. A. No. 1897-54, 3/28/55.

/s/ Robert I. Thiel
Official Reporter

86 (CERTIFICATE OF SERVICE)

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87 [Filed November 8, 1955]

JOHN T. DALY, )
Plaintiff )
v. )
WHITELY P. McCOY, et al., ) Civil Action No. 1897-54
Defendants )

MOTION FOR REHEARING

Now come the defendants by their attorney, the United States Attorney, and move this honorable Court to reconsider its earlier ruling herein for the reasons stated in the attached memorandum.

/s/ LEO A. ROVER
United States Attorney

/s/ OLIVER GASCH
Assistant United States Attorney

/s/ FRANK H. STRICKLER
Assistant United States Attorney

/s/ JOSEPH A. RAFFERTY, JR.
Assistant United States Attorney

(CERTIFICATE OF SERVICE)

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88 [Filed December 23, 1955]

JOHN T. DALY, )
Plaintiff, )
v. ) Civil Action No. 1897-54
JOSEPH F. FINNEGAN, et al., )
Defendants. )

ORDER DENYING MOTIONS FOR REHEARING

This cause having come to be heard on the plaintiff and the defendants' motions for rehearing and it appearing to the Court after consideration of the pleadings and after hearing argument of counsel for the respective parties in open court that the court's earlier ruling was in all respects proper, it is this 23rd day of December, 1955

ORDERED that the plaintiff and defendants' motions for rehearing be and the same hereby are denied.

/s/ James R. Kirkland
Judge

(CERTIFICATE OF SERVICE)

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89 [Filed December 22, 1955]

JOHN T. DALY, )
Plaintiff )
vs ) Civil Action No. 1897-54
JOSEPH F. FINNEGAN, et al., )
Defendants )

MEMORANDUM IN OPPOSITION TO THE ORDER OF THE DEFENDANTS HEREIN

This memorandum is devoted to the second Order submitted by defendants, that is, the one which ends as follows: "--providing, however, that the testimony of Paul S. Holbrook may properly be received."

Plaintiff, in the belief that said Order is wholly incompatible with the Ruling of the Court as well as injects new matter therein, objects to

the Order and upon the following grounds:

1. The Order of the defendants proposes to exclude the evidence relating to the wire tap of April 3, 1952 and is silent upon what is to become of the Charges based, as the Court has found, upon the wire tap evidence. This position is wholly untenable for (a) It is urged that such clearly violates the Ruling by the Court. On page 2 of the Ruling by the Court it is stated:

"It is quite clear that two of the charges are completely predicated upon that telephone conversation, namely, the conversation that related to contacts with the development of the Food Fair."

Here the Court has found that two of the charges are completely based upon the wire tap, and if we look, as we should, to page 3 of the Ruling by the Court, it further appears clear that these two charges cannot stand, for the Court after citing some of the leading authorities stated:

"Applying those cases, the Court will hold that the intercepted messages on that date, April 3, 1952, were unlawfully received and may not be madethe part of a charge against this particular person."

90 In addition to the foregoing, at the end of the Ruling we find these words: (p 4)

"--excluding those matters unlawfully received by the wire tap of April 3, 1952--"

(b) The efforts of the defendants to exclude or suppress this wire tap evidence not only comes too late but such evidence became part of the charges which were considered at all of the administrative levels below and a finding made at each of such levels that plaintiff was guilty of the charges which contained the wire tap evidence.

(c) Defendants now seek by its Order to do three things. (1) Exclude the wire tap evidence, being the Barrett affidavit. (2) Call Mr. Holbrook to testify that he now or back at the time it occurred authorized Miss Barrett to intercept and divulge the telephone conversation of April 3, 1952, and further, to testify as to what the plaintiff said to him on the telephone on April 3, 1952, and (3) Substitute the testimony of Mr. Holbrook for the affidavit of Miss Barrett. With the accomplishment of these

three things, the foregoing (2) and (3) now lacking and not in the record before this Court, then, at least, Specifications (b) and (c) of Charge I are proved and thus there was no violation of Section 605. The unsound position here is that the defendants now want to do or to undo those things which should have been done or should not have been done back on April 3, 1952, and thereafter pursued against plaintiff, a Veteran. We should think plaintiff's removal upon such wire tap charges was rendered "procedurally defective." Defendants appear to have the view that since Mr. Holbrook could have testified to the same things as were contained in the Barrett affidavit, there was no violation of Section 605, which is true, providing, Miss Barrett did nothing in or about the telephone conversation of April 3, 1952 without the consent of the plaintiff, the sender of that telephone conversation.

91 However, chief among those things which should not have been done was, in our view, the wire tap incident. In the Ruling this Court properly described it as an "illegal transaction".

(2) If the Court did not intend to dismiss the charges based upon the wire tap evidence, then there could have been no useful purpose served in the Ruling by the Court in remanding this cause back to the Civil Service Commission upon the following grounds:

(a) To inquire of the Civil Service Commission if these wire tap charges influenced them in their ultimate decisions. (p. 3)

(b) To inquire of the Civil Service Commission if these wire tap charges were prejudicial to plaintiff. (pp. 3-4)

(3) Defendants Order as submitted makes no mention of the above (a) and (b), nor does it touch upon the direction by the Court for the Civil Service Commission to make due and proper findings.

(4) It is understandable why defendants would not want to agree to that part of plaintiff's Order which seeks to have this Court dismiss Specifications (b) and (c) of Charge I, for it is their contentions that there was no violation of Section 605. Defendants well recognize that the only basis for leaving these two wire tap charges in the whole of the charges is for this Court to find no violation of Section 605 which this Court has

refused to do on 2 occasions. However, in plaintiff's Motion for Rehearing, (p. 7, 1st par.) I made known to defendants that the Court had dismissed these two charges and defendants made no comment thereon. Of course, the Barrett affidavit speaks specifically of Food Fair, A and P Stores and clearly purports to establish that plaintiff was not in a meeting with either of them in support of Specification (b) and (c) of Charge I, so in the final analysis, this evidence was used against plaintiff in a proceeding penal in character.

Respectfully submitted,

/s/ Rees B. Gillespie,
Shoreham Building,
Attorney for plaintiff

---

92 [Filed December 23, 1955]

JOHN T. DALY, )
Plaintiff )
v. ) Civil Action No. 1897-54
JOSEPH F. FINNEGAN, et al., )
Defendants )

ORDER

This cause having come on to be heard on March 28, 1955 on cross-motions for summary judgment filed by the plaintiff and defendants respectively and it appearing to the Court, after consideration of the pleadings, together with the affidavits and exhibits filed herein, and after hearing argument of counsel for the respective parties in open court, that there are material issues of fact herein and that Charge 3(c) in the list of charges against the plaintiff violates Section 14 of the Veterans Preference Act, it is this 23rd day of December, 1955,

ORDERED, that the motions of the plaintiff and the defendants for summary judgment be and the same hereby are denied, and it is

FURTHER ORDERED, that the case be and the same hereby is

remanded to the Civil Service Commission with directions to grant the plaintiff a new hearing excluding therefrom any evidence relating to the wire-tap incident of April 3, 1952, involving the plaintiff and Paul S. Holbrook and Mary M. Barrett, providing, however, that the testimony of Paul S. Holbrook may properly be received.

/s/ James R. Kirkland
Judge

(CERTIFICATE OF SERVICE)

* * * * * *

94 [ Filed February 21, 1956]

JOHN T. DALY, )
Plaintiff )
v. ) Civil Action No. 1897-54
JOSEPH F. FINNEGAN, Director, )
ET AL., )
Defendants )

NOTICE OF APPEAL

Notice is hereby given this 21st day of February, 1956, that Joseph F. Finnegan, Director, etc.; L. E. Eady, Director, etc.; Philip Young, Chairman, etc.; George M. Moore, Member etc. and Frederick J. Lawton, Member, etc., defendants hereby appeal to the United States Court of Appeals for the District of Columbia from the order of this Court entered on the 23rd day of December, 1955 in favor of John T. Daly denying defendants' motion for summary judgment, and from the order denying defendants' motion for rehearing of said motion, entered December 23, 1955.

/s/ LEO. A. ROVER,
United States Attorney,
Attorney for Defendants.

Send copy to:

Rees B. Gillespie, Esq.,
Shoreham Building,
Washington, D. C.

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JOHN T. FEY, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

No. 495

JOHN T. DALY, *Petitioner*

v.

JOSEPH F. FINNEGAN, Director, Federal Mediation and Conciliation Service, L. E. EADY, Director of Administrative Management, Federal Mediation and Conciliation Service, PHILIP YOUNG, Chairman, United States Civil Service Commission, ET AL., *Respondents*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REES B. GILLESPIE,
910 Shoreham Building
Washington 5, D. C.
*Attorney for Petitioner*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

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No.

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JOHN T. DALY, *Petitioner*

v.

JOSEPH F. FINNEGAN, Director, Federal Mediation and Conciliation Service, L. E. EADY, Director of Administrative Management, Federal Mediation and Conciliation Service, PHILIP YOUNG, Chairman, United States Civil Service Commission, ET AL., *Respondents*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Your Petitioner, John T. Daly, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 27, 1957.

### OPINIONS BELOW

The Ruling of the United States District Court for the District of Columbia appears at pages 50-53 of the Record and its Order at pages 58-59 of the Record. The Opinion of the Court below (Appendix A, *infra*, pp. 1a-4a) has not yet been reported.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

## QUESTIONS PRESENTED

This Court granted certiorari on January 14, 1957 in the case of *Rathbun* v. *United States,* No. 30, October Term, 1957, in which it was limited by this Court to a question, the first part of which, dealing only with interception, is identical to the question presented in the instant case.

(1) Is the listening in by a third person on an extension telephone without the consent of the sender an interception within the meaning of Sec. 605, Title 47, U.S.C.A. * * *

If this Court should answer the above question in the affirmative in the *Rathbun* case, *supra,* the Petitioner respectfully presents the remaining part of his Question Presented as follows, it arising in a civil proceeding:

and were the substantial rights of Petitioner, a Veteran, affected when his removal from his position as a Commissioner in the Federal Mediation and Conciliation Service was accomplished upon some serious charges which were based solely upon the divulgence, without his consent, of such intercepted communication.

(2) Whether the Petitioner was denied due process of law:

(a) When his guilt was prejudged in the charges of September 10, 1952, without affording him the right to be heard which he had under Section 14 of the Veterans Preference Act of 1944 as amended.

(b) When the Chief Law Officer in his decision enlarged or added new charges to the charges of September 10, 1952, and his decision was otherwise so erroneous that it should be vacated.

(3) Whether under the circumstances of the case Petitioner, being entitled to a Hearing, was denied due process of law and this Court should reconsider its decision in *Bailey* v. *Richardson*, 341 U. S. 918, which was rendered by an equally divided Court and modify or overrule the principle stated therein.

(4) Whether the Civil Service Commission complied with the procedural requirements of Section 14 of the Veterans Preference Act of 1944 as amended when its decision which removed Petitioner from his position failed to give him therein the reasons therefor in writing, and as required under the decisions of the Court below.

(5) Whether the charges lacked the specificity and detail as required by Section 14 of the Veterans Preference Act of 1944 as amended and under the precedents of the Court below.

## CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The pertinent constitutional provision and statutes involved in this case are set forth in Appendix B *infra*. (p. 5a)

## STATEMENT OF THE CASE

Petitioner is a Veteran of World War I. He was appointed a Commissioner in the Federal Mediation and Conciliation Service, hereinafter referred to as the Agency, on September 15, 1938. He had about four years prior service in the Government of the District of Columbia; making a total period of service of about 18 years for retirement purposes. He served continuously and satisfactorily in said Agency. He had served as a Regional Director in Philadelphia, Pa., from March, 1948, to January 1st, 1952 on which later date he voluntarily returned to his former position as a Commissioner. This was not a demotion. (R44) He was succeeded in said position of Regional Director by one Paul S. Holbrook, whose tragic role in this proceeding will be hereinafter

described in detail. During his service with the Agency he received many excellent efficiency ratings. (R32) His last efficiency rating, prior to the date of the charges on September 10, 1952, was satisfactory. (R22) In the charges of September 10, 1952, he was summarily relieved of all of his duties effective on the same day. (R11) Said Holbrook was serving as Petitioner's superior when the aforesaid charges were served upon him.

The Agency first made an adverse decision on September 29, 1952, separating Petitioner on October 10, 1952. (27) Then on October 10, 1952, the Agency extended "the proposed date of separation" to November 14, 1952. (28) However, on October 25, 1952, (R12-13) Petitioner, ill and under the care of Dr. E. Stuart Lyddane, made a written appeal to the Agency to review its adverse action and, when released by his physician, restore him to duty, citing the long and serious illness of his mother and of her passing away. Also, of the illness of Mrs. Daly's mother, Mrs. Barnette, who resided but a half block from their home and of her passing away. These were the main reasons his wife was not with him in his assignments out of Washington. Petitioner confessed his efficiency had been impaired. (R12-13) The decision of the Chief Law Officer of the CSC recites out of context only this admission. (42) But what did the Agency do? It treated the Petitioner's appeal, as above described in his letter of October 25, 1952, as his "answers and evidence you have submitted in reply to the charges * * *", and this the Agency delayed doing until on November 14, 1952 (R14) which was the very day on which Petitioner's removal was to become effective as had been long previously fixed by the Agency. (R28) In other words, the Agency waited 19 days to answer Petitioner's letter of October 25, 1952. It would serve no useful purpose for the Petitioner to deny the charges after the Agency had acted adversely thereon and in such an incredible fashion.

The adverse decision of the Agency dated November 14, 1952 (R14) merely held that Petitioner's retention was "not warrant[ed]." The decision of the Chief Law Officer (R47-48) held "that no change be made in the personnel action" taken by the Agency as above described. The decision of "The Commissioners" of the CSC (18-19) by Corrected Copy dated March 31st, 1954, (R19), held that Petitioner's removal "was warranted". All three adverse decisions failed to comply with Section 14 of the Veterans Preference Act of 1944 as amended which required that the adverse decision upon which Petitioner "shall be discharged" shall be "for such cause as will promote the efficiency of the service *and for reasons given in writing.*" (Italics supplied) The same proviso in italics appears in the Lloyd-LaFollette Act of August 24, 1912, c. 389 § 6, 37 Stat. 555, 5 U. S. C. 652.

Petitioner requested a Rehearing before the CSC on March 31, 1954. (R19-20) It was denied 2 days later on April 2, 1954, (R20-21) though the CSC had held Petitioner's appeal for about 11 months.

District Court denied the motions for summary judgment filed by the respective parties but remanded the case to the CSC for a new hearing excluding therefrom any evidence relating to the wiretap incident of April 3, 1952 and providing "that the testimony of Paul S. Holbrook may properly be received." (58-59), though the Ruling by the Court provided for more extensive relief. (R50-53) It is apparent that the only purpose of providing in defendant's below second order (R55) for the taking of the Holbrook testimony was to substitute it for the unlawful wiretap evidence as represented by the Barrett affidavit, (R29-31), it being the only evidence of the conversation between Petitioner and Holbrook in these proceedings. Appellants appealed. Appellee filed a motion to dismiss on the ground the Order was not a final one. It was denied without prejudice to a renewal at the argument on the merits. Appellee preserved it at the

Hearing. The judgment of District Court was reversed with instructions to the District Court to grant defendant's motion for summary judgment. Appellee's motion to dismiss was denied. (App. 4a)

**The Demotion of June 2nd, 1952**

Petitioner was demoted on June 2, 1952, solely upon a series of alleged offenses dated April 3rd, 1952. Petitioner was not given the reasons for his demotion (R33), and, accordingly, it was an invalid demotion for it failed to comply with the procedural requirements of Section 14. (R45) But the alleged offenses occurring on April 3rd, 1952, which were the sole basis for the demotion were used again and later became Charge 1, Specifications (a), (b), (c) and (d) of the Charges to dismiss Petitioner dated September 10, 1952. (R6, par 13, R43, R45) However, three of the four above specifications were based upon wiretap evidence as will be shown hereinafter. Plainly, if Petitioner had been given the reasons for his demotion, in affording him an opportunity to defend himself, whether he had been successful or not, these wiretap charges would not have come to light again and they, therefore, could not have been made a part of the charges to dismiss him on September 10, 1952. The unlawful demotion was highly prejudicial to Petitioner in his defense to the said Charges to dismiss him.

These same alleged offenses occurring on April 3rd, 1952 were also the sole basis for Petitioner being placed on probation on June 3, 1952. (R35) It is noteworthy to observe that this probation referred specifically to Petitioner's transfer to New York, (R11) from Philadelphia where the incidents of April 3rd, 1952 took place. But this period of probation of 12 months was, like the demotion, invalid, as there is no known authority for placing a Veteran on probation for such an extended period of time. Also the probation, like the demotion, became part of the charges of September 10, 1952 upon

which Petitioner was separated. (R11) Here it is demonstrated that Petitioner was punished by three separate disciplinary actions for the same offenses of April 3, 1952 upon which three of the four specifications it will be shown were based upon wiretap evidence. Two Hearing Officers, the Chief Law Officer and the three Civil Service Commissioners failed and neglected to correct this shameful procedure. (R39-48, "The Commissioners, being the last three lines at R18, to include Corrected Copy (March 31, 1954) (R19).

The Court below erroneously stated (App. 3a) that the decision of the Chief Law Officer was affirmed by the Board of Appeals and Review. There was no decision by the Board of Appeals and Review.

**The Charges of September 10, 1952**

Charge 1, Specifications (a), (b), (c) and (d) relate to Petitioners alleged offenses on April 3, 1952. (R9-10) Holbrook was the complaining witness in all of them. Petitioner claims that Specifications (b), (c) and (d) were based solely upon wiretap evidence. District Court found that "two of the charges are completely predicated upon that telephone conversation." (R51) The Court below found that the wiretap evidence "bore upon only one of the four specifications". (App. 3a) (Note: All other charges are hereinafter presented for the purpose of showing lack of specificity as required in Section 14.)

At 3:15 PM on the afternoon of April 3, 1952, being (c) above, Petitioner, as sender of a telephone conversation, telephoned his superior, Holbrook, who buzzed the office of Miss Barrett, his Secretary, once, which served as a signal for her to use the extension telephone in her office to record a telephone conversation. At the signal, she picked up the receiver and started taking notes. The conversation was between Petitioner and Holbrook. From her stenographic notes she prepared a Memorandum for

the Record bearing the same date. From this Memorandum for the Record she made an affidavit dated January 23, 1953, and this she did at the request of one Rene Callec[illegible]n Investigator of the Civil Service Commission (R29-31) who either filed it or caused it to be filed in Petitioners record in the Commission about a week before the Hearing on March 6, 1953. (R32) The Court below erroneously stated (App. 3a) that it was the aforesaid Memorandum which was illegally admitted whereas it was the above affidavit made by Miss Barrett. Miss Barrett's affidavit could scarcely have been filed before it was sworn to on January 23, 1953, which was 70 days after Petitioner was removed on November 14, 1952 and more than 4 months after the charges of September 10, 1952. But this wiretap evidence was not discovered until on or about April 7, 1954, (R32-34) which was after the final decision, March 5, 1954, upon which Petitioner was removed. However, such interception and divulgence were in violation of Section 605 of the Communications Act of 1934, 47 U. S. C. 605. Petitioner, as sender of the telephone conversation, neither authorized its interception nor consented to its divulgence. Though Holbrook directed Miss Barrett to intercept and record the telephone conversation, there is not a whit of evidence that he gave her, as receiver of the telephone call, his permission for her to divulge it. This shameful act was directed against a fellow-employee in the same office and a Veteran of World War I.

Charge 1(c): Petitioner was accused and convicted of falsely informing Holbrook in *3:15 P.M.* telephone conversation that he was "meeting with representative Mullin of the *A & P Stores.*" The Barrett affidavit, Paragraphs 4 & 5, (R30), allegedly proved that Petitioner lied when he so informed Holbrook. (Note: Clearly, this wiretap evidence proved 1(c).) But this wiretap conversation between Petitioner and Holbrook *also* was devoted to what, if anything, Petitioner had done as to

*Food Fair,* which was the earlier Charge 1(b) wherein Petitioner was accused and convicted of falsely informing Holbrook at 1:30 PM that he was "meeting with • • • Food Fair situation." Here the Barrett affidavit shows Holbrook inquiring of Petitioner, "if he had *done anything* on the *Food Fair* situation, whereupon Petitioner informed him "that he *hadn't done anything* except check with Jules Schwartz." (30) Now if Petitioner "hadn't done anything except check with Jules Schwartz" *by 3:15 PM,* it is alleged proof that he could not have been in a meeting with *Food Fair* earlier at 1:30 PM. (Italics supplied) However, there is more evidence in the Barrett affidavit to prove Charge 1(b). As shown by the Barrett affidavit, Mr. Shapiro was attorney for Food Fair. In the Barrett affidavit, being the last two lines at (R30), to the end of that paragraph on the next page, we find Holbrook demanding that Petitioner call Mr. Shapiro, while Petitioner is insisting there would be no strike, stated: "All right, we'll set up a meeting." Plainly, there would be no point in setting up a meeting if there had previously been a meeting at 1:30 PM, so it was proof there was no meeting at 1:30 PM and thus proof of Charge 1(b). (Clearly, this wiretap evidence proved 1(b).).

Charge 1(d) is not, as the Court found below (App. 3a), "a call at 5:30 PM", it was a meeting between Petitioner and Holbrook wherein Petitioner was accused of having "compounded [his] falsification by alleging that you informed him only that you were "in contact" with the parties." The only proof of any falsification is the Barrett affidavit, so that which provided the "compounding" of the falsification was based upon a "lead" from wiretap evidence and as such was "a fruit of the poisonous tree." *Nardone* v. *United States,* 308 U. S. 338. (Clearly, this wiretap evidence proved 1(d)). The Court below found (App. 3a) that "the telephone call at 3:15 on April 3, 1952, *bore upon only one* of the four specifi-

cations." As above shown, the Barrett affidavit "bore upon" both A & P Stores as well as Food Fair. It also bore upon 1(d).

On the other hand, Holbrook's own affidavit (R23) proved that Petitioner was "in contact" with Mr. Poole's office "that morning", and had a telephone conversation with Mr. Schwartz of Food Fair "that afternoon". Thus, Petitioner was, in fact, telling the truth, when he told Holbrook he was in contact with the parties. Petitioner's affidavit (R15) dated December 24, 1952 confirmed it before he could have possibly known that Holbrook himself would confirm it by his own affidavit (R23) dated January 23, 1953. (R23-24 fixes the date.) Many persons in the administrative levels had to see this wiretap evidence and this incident relating to the charge "no contact" in 1(d), and all remained silent. Petitioner denied all of the charges in his affidavit (R15-17) dated December 24, 1952, except Charge 3(b), which related to his being late at work on August 25, 1952.

At the end of the charges, (R11) the Agency informed Petitioner that "it has been determined that you can no longer satisfactorily perform the duties of a Commissioner and should be separated from the Service. In order to effectuate this "determination" and bent upon doing it speedily, the Agency then relieved him of his duties on the same date as the charges, without awaiting for Petitioner's answer to the charges which he was entitled to make under Section 14.

## REASONS FOR GRANTING THE WRIT

### I

**Is the listening in by a third person on an extension telephone without the consent of the sender an interception within the meaning of Sec. 605, Title 47 U. S. C. A., and were the substantial rights of Petitioner, a Veteran, affected when his removal from his position as a Commissioner in the Federal Mediation and Conciliation Service was accomplished upon some serious charges which were based solely upon the divulgence, without his consent, of such intercepted communication?**

The Court below in reference to the charges based upon wiretap evidence states that the "first point on the appeal concerns the admissibility of disputed evidence."* The Court further stated that the "Secretary's Memorandum was illegally admitted to the record at the Commission." It is true that a record of the wiretap evidence was so admitted, but it was the Barrett affidavit which recited the intercepted telephone conversation and it was the only evidence before the Courts below and here on the three charges (b), (c) and (d) of Charge 1. It is interesting to note that the Chief Law Officer's decision makes no reference to any one of the 4 Specifications in Charge 1. The Court below found that the wiretap evidence "bore upon only one of the four specifications" in Charge 1. (App. 3a) We have shown in our Statement of the Case that 3 of these charges were based upon the intercepted telephone conversation at 3:15 PM wherein Petitioner and Holbrook discussed the activity of the former in *both* the Food Fair and the A & P Stores situation. The Court below further concluded that it did not reach the question "whether the evidence was or was not properly considered." (App. 4a) It also passed all other questions pre-

* Appellants below stated its question presented No. 1 as follows: "Whether a Secretary who listened to a telephone conversation on an extension and transcribed it, under the instructions of a party to the conversation, has 'intercepted' a communication in violation of Section 605 of the Communications Act."

sented except that the invalidity of one of the charges will not vitiate a removal where the remaining charges are valid and sufficient, which ruling is in error here.

As far as can be determined, there is no precedent on or approaching the consideration of and a decision based upon wiretap evidence on an issue of a civil character in a quasi-judicial proceeding, of which there are so many in the Executive Branch of the Government. However, Petitioner told the Court below in oral argument that there is pending in our local District Court the case of another removal, like the instant case, upon wiretap evidence. (*Sheehan* v. *Wilson*, Civil Action No. 3590-53)

The only precedent in our Federal Courts dealing with a civil action based upon a violation of Section 605 arose in the case of *Reitmeister* v. *Reitmeister*, C. C. A. 2, 162 F. 2d 691, 694. There a civil action was instituted for damages arising out of an interception and later divulgence in a Probate Court of conversations between two brothers. The conversations were recorded on a mechanical devise which would automatically take down what came out of a telephone receiver. Judge Learned Hand found such a recording an interception and its publication unlawful. Judge Hand said:

> "Although the act does not expressly create any civil liability, we can see no reason why the situation is not within the doctrine which, in the absence of contrary implications, construes a crminal statute, enacted for the protection of a specified class, as creating a civil right in members of the class, although the only express sanctions are criminal."

It would seem peculiarly appropriate here to show that while the case of *Nardone* v. *United States*, 302 U. S. 379, was directed at federal officers in the detection of crime resorting "to methods deemed inconsistent with ethical standards and destructive of personal liberty," Mr. Justice Roberts included (p. 384) "as well as others." But

this Court has said that only this Petitioner is to be protected. Judge Learned Hand was also the author of the opinion in *United States* v. *Goldstein*, 120 F. 2d 485, 490, which was affirmed by this Court in 316 U. S. 114, where this Court said, (p. 121) in speaking of the view of Judge Hand, "The Court further thought that, as the sender might make such divulgence lawful by his consent, none but he was intended to be protected against divulgence. Again we agree." While a question of search and seizure under the Fourth Amendment was before this Court in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 395, Mr. Justice Holmes, in speaking of a statute forbidding the acquisition of evidence, made it abundantly clear that the evidence so obtained shall not merely be used before the Court, "but that it shall not be used at all." In light of this admonition, it would appear to be inescapable that the Civil Service Commission would have to be included. If so, then the use and consideration of improper evidence, upon which Petitioner was removed from his position, would deny to him a fair and impartial Hearing. In *Kotteakos* v. *United States*, 328 U. S. 750, 762, 764-765, 775, in a cause where in terms no distinction was made between a criminal and civil statute, Mr. Justice Rutledge said: "The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting." This Court has repeatedly denounced the practice, which, in our humble view, would go to the issue of whether Petitioner received a fair and impartial Hearing. Mr. Justice Holmes in his dissenting opinion in *Olmstead* v. *United States*, 277 U. S. 438, referred to the practice of wiretapping as "dirty business." Mr. Justice Frankfurter in his dissenting opinion in *On Lee* v. *United States*, 343 U. S. 747, 758, in speaking of wiretapping referred to the 'odious doctrine' as Mr. Justice Brandeis called it, "that the end justifies reprehensible means."

II

**Whether the petitioner was denied due process of law:**

**(a) When his guilt was prejudged in the charges of September 10, 1952, without affording him the right to be heard which he had under Section 14 of the Veterans Preference Act of 1944 as amended.**

**(b) When the chief law officer in his decision enlarged or added new charges to the charges of September 10, 1952, and his decision was otherwise so erroneous that it should be vacated.**

(a) The first paragraph of the charges of September 10, 1952 (R9) provided that Petitioner would be separated "effective thirty days after the date of receipt of this letter by you". The Agency then had determined the date of his discharge.

After the recitation of all of the Charges (R11), the Agency made it plain to Petitioner that it had determined he was to be removed and it did so in the following language:—

> "It is apparent that you have failed to comply with the terms applicable to your service during the probationary period and, therefore, it has been determined that you can no longer satisfactorily perform the duties of a Commissioner of Conciliation and should be separated from the service."

In order that such a "determination" to remove Petitioner may be put into effect as speedily as possible, the Agency made it effective contemporaneous with the date of charges, that is, September 10, 1952. In the next to the last paragraph (R11) the Agency continued:

> "Effective as of today, your official duty station is being changed from New York, New York, to Washington, D. C. where you will be attached to the office of the Associate Director of the Service for reporting purposes only."

It has been shown in Petitioner's Statement of the Case the highly unwarranted action taken by the Agency, through its respondent, L. E. Eady, Director of Administrative Management. It is unthinkable that he did or could have taken such action without the explicit knowledge and approval of the Director of the Agency. The basis he used for such action and the method followed is compelling proof that Petitioner's guilt had been prejudged. Eady well knew, due to his qualifications in the peculiar area in which he acted in matters involving personnel, that he had nothing in Petitioner's letter of October 25, 1952 upon which to base his action, and it was clearly reckless. Eady had to know about the wiretap incident but on that he saw fit to take no action whatsoever. In fact, as matters later developed, Eady removed Petitioner 70 days prior to the time the wiretap evidence was placed in Petitioner's file in the CSC by an employee of the CSC, so Petitioner could not have given any answer to that evidence before his removal on November 14, 1952.

The Chief Law Officer had to have Petitioner's letter to Eady dated October 25, 1952 for he inserted a paragraph of it out of context in his decision. With Eady's adverse decision of November 14, 1952, before him it was plain to the Chief Law Officer what Eady had done. The Chief Law Officer remained silent. The Commissioners merely affirmed the Chief Law Officer. The precise question herein was before the Court of Claims in *Elchibegoff* v. *United States*, 106 C. Cls. 541. The Agency had notified the plaintiff in three letters "that he was being separated". The CSC took the following view: (p. 553) "In other words, a decision had already been made to discharge him and the date of the discharge was determined". Chief Judge Jones said (p. 560) "To construe the three letters as a compliance with the law when each of them contains the statement that the matter had already been determined is almost to make a mockery

of the law". Petitioner was denied a fair and impartial hearing.

(b) Charge 2 of the charges (R10) refers to a conversation between Petitioner and the Associate Director on April 9, 1952 on the topic of Petitioner's alleged habit of intemperance.

It is the only conversation referred to in the charges on such a subject. However, since the decision of the Commissioners of the CSC merely affirmed the decision of the Chief Law Officer without an opinion, it is important to invite the attention of the Court to what the Chief Law Officer did in his decision.

(1) The Chief Law Officer enlarged or added new charges to the charges of September 10, 1952 when he stated in his decision that Petitioner's "*intemperance which affected his performance and reliability were discussed with him by officials on a number of occasions.*" (R47) (Italics supplied)

(2) At the end of the charges, it is stated that Petitioner was transferred from Philadelphia, Pa., to New York City, this being the only reference in the charges to a transfer. The Chief Law Officer enlarged or added new charges to the charges of September 10, 1952 when he stated in his decision that the Petitioner "*was transferred and reassigned on several occasions with a view of affording him an opportunity to improve his record.*" (R47) (Italics supplied) Both the "discussions" and the "transfers and reassignments" were entirely new charges. They were highly prejudicial. Like the wiretap charges, these too were ignored. The Chief Law Officer and the Commissioners were in the role of Hearing Officers. In these circumstances, Petitioner could not have been accorded a fair and impartial hearing.

The decision of the Chief Law Officer consists of 3 lines (R39) and continues to (R48) a total of 8 pages and 14 lines.

(1) From (R39), to the middle of (R46), a total of 6 pages and 15 lines, the Chief Law Officer deals only with the *demotion* of June 2, 1952, except at (R43) the paragraph beginning with "During the hearing on the appeal * * *" down to the end of that paragraph. In the first sentence of this paragraph, appears the only mention of Charge 1 in the entire decision. At (R43) in the same paragraph Charge 2 is mentioned only to correct the date it occurred. The alleged intoxication is again mentioned in the second paragraph at (R46) and *again* the correction of the date it occurred is made. Charge 3 is not mentioned in the decision.

(2) Charges 1, 2 and 3 are mentioned at (R46-47) only to place under the appropriate charge the names of the persons who made affidavits and names of persons who testified.

(3) At (R46) the decision devotes about 10 lines to the "Relative to the merits of the case * * *", then devotes 19 lines to the material described in the above (2). Lastly, adds the two new charges and tell us how the Agency "considered" Petitioner.

A plea is here made to the Court to vacate the decision of the Chief Law Officer, which would have the effect of rendering void the decision of the Commissioners dated March 5, 1954. (R18-19) Petitioner's removal upon such a decision was wholly lacking of any concept of fairness. *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 581 (Webster's Argument), *Murray's Lessee* v. *Hoboken Land Imp. Co.*, 18 How. 272, 280-281, *Kessler* v. *Strecker*, 307 U.S. 22, 34, *Bridges* v. *Wixon*, 326 U.S. 135, 154, *Joint Anti Fascist Committee* v. *McGrath*, 341 U.S. 123, 136, 168-170, 177.

III

**Whether under the circumstances of the case Petitioner, being entitled to a Hearing, was denied due process of law and this Court should reconsider its decision in Bailey v. Richardson, 341 U. S. 918, which was rendered by an equally divided Court and modify or overrule the principle stated therein.**

In *Bailey* v. *Richardson*, 86 U. S. App. D. C. 248, the Appellant was given a temporary appointment on March 25, 1948, and on the following May 28, 1948, she was reinstated but subject to the condition that her removal might be ordered by the Civil Service Commission if investigation of her qualifications, made within 18 months, disclosed disqualifications. She was removed under a proviso of the Executive Order 9835. The Court said that the "President, *absent congressional restriction*, may remove from Government service any person of whose loyalty he is not completely convinced", and that he may do so "without assigning any reason and without giving the employee any explanatory notice." (Italics supplied) But the Court also found (p. 259) that Miss Bailey was not entitled to a Hearing under the Lloyd-LaFollette Act. Further, the Court found (p. 259) as follows: "In terms the due process clause does not apply to the holding of a Government office." In the instant case, it is submitted that we have a "Congressional restriction", for Petitioner is entitled to a Hearing which he received as provided by the mandate of Congress in Section 14. It is respectfully urged that upon the whole record here Petitioner was denied a fair and impartial Hearing, and, therefore, the *Bailey* case, *supra*, in its broad and sweeping language, should be reversed.

## IV

**Whether the Civil Service Commission complied with the procedural requirements of Section 14 of the Veterans Preference Act of 1944 as amended when its decision which removed petitioner from his position failed to give him therein the reasons therefor in writing, and as required under the decisions of the Court below.**

The pertinent provision of Section 14 of the Veterans Preference Act of 1944 provide (App. B, p. 5a):

> "No permanent * * * preference eligible, * * * shall be discharged * * * except for such cause as will promote the efficiency of the service *and for reasons given in writing* * * *." (Italics supplied)

In the administrative proceeding below, three adverse decisions were rendered and in none of them were the "reasons given" therein for the adverse decisions. (*Supra* p. 5) Section 14 of the Veterans Preference Act of 1944 as amended required that it be done. The same clause appears in the Lloyd-LaFollette Act of August 24, 1912, c 389, § 6, 37 Stat. 555, 5 U. S. C. 652.

The decisions of the Commissioners of the Civil Service Commission by its adverse decision dated March 5, 1954, by its Corrected Copy dated March 31st, 1954, merely held that Petitioner's removal "was warranted." (R. 18-19)

Plainly, upon this showing alone, Petitioner was entitled, as a matter of law, to reinstatement by the Court below. The clear unequivocal language of the decisions of the Court below and of the Court of Claims support this contention. *Mulligan* v. *Andrews*, 93 U. S. App. D. C. 375, 211 F. 2d 28, *Kutcher* v. *Higley*, 98 U. S. App. 278, 235, F. 2d 505 and *Blackmar* v. *United States*, 130 C. Cls. 812. In the *Mulligan* case, *supra*, the Court below in speaking of the decision which removed the Appellant said: "The key clause in that decision was 'the evidence is such as to show your unsuitability'." The Court

continued: "Plainly, and we so hold, the requirement of 'reasons' for removal is not satisfied by the conclusion of 'unsuitability' based upon vague references to Appellant's answer and 'facts developed during the investigation.' The decision failed to disclose which of the charges contained in the notice of proposed adverse action were relied upon for removal; or, whether removal rested upon any of the charges." The Court of Claims in the *Blackmar* case, *supra*, adopted the rationale of the *Mulligan* case, *supra*. The *Kutcher* and *Blackmar* cases, *supra*, both involved Veterans.

## V

**Whether the charges lacked the specificity and detail as required by Section 14 of the Veterans Preference Act of 1944 as amended and under the precedents of the court below.**

It is submitted, with great deference to the Court below, that under its decisions on the lack of specificity in charges, the remaining charges 1(a), 2, and 3(a) and 3(c) should not have been permitted to stand. As to Charge 3(b) it is without sufficient substance to warrant a dismissal on it. If, on the other hand, and apart from the other questions presented, it is found that the Petitioner's substantial rights were not affected by his conviction upon the three wiretap charges, and he is not entitled to relief upon them alone, then, it is submitted, in the alternative, that each of the three wiretap charges are tainted and should not be permitted to stand.

Charge 1(a): Petitioner was accused and convicted of being unavailable "on the morning of April 3, 1952" when he was needed to service the Food Fair and A & P Stores which had been assigned to him. Holbrook's own affidavit (R23) proves that Petitioner called Mr. Poole on "that morning" so he was on the job. But the "Key" word in the charge is that Petitioner was then "needed", when the remaining charges even down to 5:30 PM fails to

show that labor and management were deadlocked for it is axiomatic, in the area of Petitioner's duties, that only when all negotiations failed would he step in to it. If there had been a strike or the inminence of one, a person would have to be quite naive to think that Holbrook would not have made the most of it. Holbrook determined to "tap" Petitioner's telephone call to him at 3:15 PM, but he was too busily engaged in a criminal activity to ask Petitioner where he was or had been "this morning".

Charge 2: Here Petitioner was accused and convicted of having a "habit of intemperance that has seriously interfered with your work perforcance," yet in this broad and sweeping charge only one instance of "apparently under the influence of intoxicants" is recited as is this one instance of interfering with his work. For this charge to conform to the well-recognized requirement of specificity, in order that Petitioner may be accorded a fair opportunity to defend himself, a series of drinking incidents with the dates and places thereof would have to be charged and proven and the same may be said with reference to his work. Only then could this Charge 2 be sustained. It was hopelessly vague. All Petitioner could do was to enter a general denial. After 14 years of continuous service, the Agency could come up with only one instance of drinking. (Note: This alleged drinking incident is stated in the charges as August 26, 1952 whereas it should have been August 22nd, 1952, the Agency missed it 4 days yet it was quite close to the date of the charges.) (R46)

Charge 3 (a): This one charges Petitioner with reporting late on August 18, 1952 which he had done on many prior occasions with the approval of the Regional Director, for he had not previously directed him to stop it. Then this is made a charge as of that date.

Charge 3 (b): On this one Petitioner expressed his regret for an unintentional violation. His affidavit (R16) discloses that he was required to work at night and over week-ends and that "the practice of reporting late to work was not new."

Charge 3 (c) was dismissed by District Court (R52) upon the ground that it failed to provide Petitioner the specificity and detail required of Section 14. This charge is hopelessly lacking in specificity, yet is it not incomprehensible that it went through all of the levels at the CSC without it being disturbed? *Deak* v. *Pace*, 88 U. S. App. D. C. 50, 185 F. 2d 997, *Money* v. *Anderson*, 93 U. S. App. D. C. 130, 208 F. 2d 34, *Manning* v. *Stevens*, 93 U. S. App. D. C. 225, 208 F. 2d 827. The Court below in the *Manning* case, *supra*, consistently referred only to the "charge" with the word quoted. Petitioner was, therefore, required to examine the file in the District Court, Civil Action No. 5166-51 to ascertain the nature of the charge. Appellant was there charged in Exhibit A attached to the Complaint with "during the period March-April, 1950, you participated with * * * in abnormal sexual practice or practices." The Court below found such a charge lacked specificity and reversed the judgment of the District Court. Judge Letts ordered Appellant reinstated on June 11th, 1954. The ruling is consistent with principle. We can find no better expression of it than that made by Mr. Justice Brandeis in his dissenting opinion in *Olmstead* v. *United States*, 277 U. S. 438, 484, where there this Court decided that the acquisition and use of wiretap evidence did not violate the Fourth Amendment. Mr. Justice Brandeis said: "The confirmed criminal is as much entitled to redress as his most virtuous fellow citizen; no record of crime, however long, makes one an outlaw."

In the *Kotteakos* case, *supra*, this Court disagreed with the ruling that the permeating error did not affect the "substantial rights of the parties", and said: (p. 775) "That

right, in each instance, was the right not to be tried en masse (in italics) for the conglomeration of distinct and separate offenses committed by others as shown by this record." In the instant case, Petitioner's substantial rights were affected upon his being tried on some charges based solely upon evidence which Congress had outlawed by Section 605, the violation of which Congress also had made a serious crime by Section 501. Attorney General Brownell in a statement dated April 20, 1954 in Hearings before Subcommittee 5 of the House Judiciary Committee on March 23, 1955 made it clear that the authority he sought to wiretrap would be confined to instances involving only our National Security, (p. 33) yet he recognized that, "The problem touches each of us." (p. 29)

Petitioner respectfully submits that there should not be a maximum standard of protection for one engaged in a criminal activity, including one who would destroy us, and none for himself. Under the full impact of the decision of the Court below, it would seem inevitable that this grave question herein will soon reach this Court.

## CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a writ of certiorari should be granted.

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*Attorney for Petitioner.*

## APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13256

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JOSEPH F. FINNEGAN, Director, Federal Mediation and Conciliation Service, L. E. EADY, Director of Administrative Management, Federal Mediation and Conciliation Service, PHILIP YOUNG, Chairman, United States Civil Service Commission, et al., APPELLANTS

v.

JOHN T. DALY, APPELLEE

---

Appeal from the United States District Court for the District of Columbia

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Decided June 27, 1957

*Mr. Samuel D. Slade*, Attorney, Department of Justice, with whom *Assistant Attorney General Doub*, *Mr. Oliver Gasch*, United States Attorney, and *Mr. Lionel Kestenbaum*, Attorney, Department of Justice, were on the brief, for appellants. *Mr. Leo A. Rover*, United States Attorney at the time the brief was filed, and *Mr. Lewis Carroll*, Assistant United States Attorney, also entered appearances for appellants.

*Mr. Rees B. Gillespie* for appellee.

Before PRETTYMAN, FAHY and BASTIAN, Circuit Judges.

PRETTYMAN, *Circuit Judge*: Appellee Daly was a Commissioner in the Federal Mediation and Conciliation Service. He was a veterans' preference eligible. He was served with a letter of charges, which consisted of allega-

tions of dereliction of duty, intemperance, and disregard of instructions. He responded and thereafter was given notice of an intended discharge. He appealed to the Civil Service Commission, which after hearing affirmed. He then brought the present civil action for declaratory judgment and mandatory reinstatement. The District Court held that certain evidence received by the Commission was inadmissible, and therefore it remanded the case for reconsideration without the disputed evidence. The defendants, Government officials, appealed.

The first point on the appeal concerns the admissibility of disputed evidence. Daly had been stationed in Philadelphia. A matter concerning Food Fair-A & P Stores was pending. The first of the charges against Daly was dereliction of duty and failure to service that case. It appears he was supposed to be working on the case on a certain day (April 3, 1952), and the first part of the charge was that he could not be found. One of the subparagraphs of that charge was:

> "c. At 3:15 P. M. that day, you telephoned your Regional Director by telephone that you were meeting with representative Mullin of the A & P Stores."

In his later denial Daly said:

> "I deny that at 3:15 p. m. on that day I telephoned the Regional Director and informed him I was meeting with Representative Mullen of the A & P Stores."

There had been a telephone call from Daly to the Regional Director at 1:30 p. m. When Daly called again at 3:15 p. m. the Director, one Holbrook, signaled his secretary to take notes on the conversation. She picked up the receiver and took notes, which she recorded in a memorandum "For the Record". The original of the memorandum was placed in the Regional Confidential File. When the case was appealed to the Civil Service Commission, that tribunal had before it several affidavits,

including one from Holbrook and one from his secretary, and also had the memorandum "For the Record". The District Court held that the secretary's memorandum was illegally admitted to the record at the Commission, its use being in violation of Section 605 of the Communications Act.[1] But we do not reach that question.

The second point on this appeal is that, even though appellants be not sustained on their first point and subparagraph (c) of Charge 1 was erroneously sustained by the Commission, there remained in the charges and proof sufficient to sustain the ultimate action of the authorities in dismissing Daly. We agree. There were three charges, with four specifications in Charge 1 and two in Charge 3. The first charge was dereliction of duty, failure to service an assigned case, and giving false information, all alleged to have occurred in Philadelphia. Specification (a) related to the morning of April 3, 1952; (b) related to a phone call made at 1:30 p. m. that day; (c) related to the disputed call at 3:15 p. m.; and (d) related to a call at 5:30 p. m. Charge 2 related to a habit of intemperance and referred to occurrences in New York City after Daly had been transferred there from Philadelphia. Charge 3, with its two specifications, related to occurrences in New York. Thus it is apparent that the disputed evidence as to the telephone call at 3:15 p. m. on April 3, 1952, bore upon only one of the four specifications in one of the three charges.

The Chief Law Officer of the Civil Service Commission, after describing all the charges, concluded: "On the weight of all the evidence as to the merits of the case, it is concluded that the charges are sustained; * * *." That decision was affirmed by the Board of Appeals and Review and by the Commissioners.

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[1] 48 STAT. 1103 (1934), 47 U.S.C.A. § 605.

Charges 2 and 3, if sustained, were sufficient to support the dismissal. They were not affected by the disputed evidence, and so we do not reach the question whether that evidence was or was not properly considered. It is established that the invalidity of one charge will not vitiate a dismissal where the remaining charges are valid and sufficient.[2]

The judgment of the District Court is reversed, and the case will be remanded with instructions to the District Court to grant the defendants' motion for summary judgment.

We have before us a motion by Daly to dismiss the appeal. He says the order of the District Court was interlocutory and not appealable. But that order completely and finally disposed of the case in the District Court, and we do not see how the Government could obtain a review of the order except by an appeal from it at this time. We think the order was appealable.

***Reversed and remanded.***

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[2] *Baughman* v. *Green*, 97 U.S. App. D.C. 150, 229 F.2d 33 (D.C.Cir. 1956); *Williams* v. *Cravens*, 93 U.S. App. D.C. 380 210 F.2d 874 (D.C.Cir. 1954), *cert. denied*, 348 U.S. 819, 99 L.Ed 646, 75 S.Ct. 30 (1954); *Devine* v. *Campbell*, 90 U.S. App. D.C 171, 194 F.2d 876 (D.C.Cir. 1952), *cert. denied*, 344 U.S. 826, 9 L.Ed. 643, 73 S.Ct. 27 (1952).

## APPENDIX B

### CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

**1. Constitutional Provision**

The Fifth Amendment to the Constitution provides in part as follows:

> "No person shall be * * * deprived of life, liberty, or property, without due process of law;"

**2. Statutes**

The Communication Act of June 19, 1934, 48 Stat. 1103, 47 U. S. C. § 605 provides in part as follows:

> "No person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, pruport, effect, or meaning of such intercepted communication to any person;"

Section 14 of the Veterans Preference Act of Ju[illegible] 27, 1944 as amended, 63 Stat. 1067, 5 U. S. C. 863 provides in part as follows:

> "No permanent * * * preference eligible * * * shall be discharged * * * reduced in rank or compensation * * * except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge * * * or reduction in rank or compensation is sought shall have at least thirty days' advance written notice, * * * stating any and all reasons, specifically and in detail, for any proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing * * * and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, * * * *Provided*, that such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, * * * after investigation and consideration of the evidence submit-

ted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, • • •

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

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No. 495

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JOHN T. DALY, *Petitioner*

v.

JOSEPH F. FINNEGAN, Director, Federal Mediation and Conciliation Service, L. E. EADY, Director of Administrative Management, Federal Mediation and Conciliation Service, PHILIP YOUNG, Chairman, United States Civil Service Commission ET AL., *Respondents*

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## REPLY TO OPPOSITION FILED BY RESPONDENTS

---

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IN THE

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## REPLY TO OPPOSITION FILED BY RESPONDENTS

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Petitioner respectfully presents the following brief as his Reply to Respondents' Opposition filed herein.

Respondents contend (Opp. 8) that the "disputed evidence", being the wiretap evidence, obtained at 3:15 PM on April 3, 1952, "is relevant, as the Court below recognised, only to Charge 1(c), [A & P Stores], that Petitioner made false representations during that conversation." But Respondents have made no attempt to show, as they are required to do, that such "false representations" in that conversation were confined *solely* to the A & P Stores situation. The bold assertion, and a conclusion, standing alone

as it does that "The transcription is immaterial to the rest of the first charge * * *", is no proof of the assertion.[1] Respondents urge that it was not necessary to pass upon whether the wiretap evidence "was or was not properly considered." Petitioner submits that the Court below was first required to pass on the question of whether there had been a violation of Section 605, and if it found a violation, then, since the unlawful evidence had been already considered and Petitioner's removal based upon such unlawful evidence, were Petitioner's substantial rights affected or was he denied a fair and impartial hearing. If the Court below reached an adverse decision on these questions, then all other procedural errors, relied upon here, would have to be reached and adversely to Petitioner before the Court below could rely upon the validity of one or more charges as reasons for removal. A favorable finding upon a procedural error would entitle Petitioner to reinstatement.

Respondents insist (Opp. 9(1)) as to Charge 2 that "a specific instance of intoxication" and "a conversation with his superior about Petitioner's intemperance", satisfies the statutory rule as to specificity under Section 14 in the broad and sweeping charge of a "habit of intemperance". Respondents give a singular meaning to the word, "habit". Respondents rely upon *Williams* v. *Craven*, *supra*, and quote a part of a sentence therefrom. Significantly, the *Williams* case, *supra*, did not involve a Veteran so it was before the Court below under the Lloyd-LaFollette Act of August 24, 1912, 37 Stat. 555, 5 U. S. C. 652. There is no

[1] All were agreed in District Court that more than one charge was based upon the wiretap evidence. Judge Kirkland found that, "It is quite clear that two of the charges are *completely predicated* upon that telephone conversation * * *." (R51) In Defendants' Motion for Rehearing in District Court (P2), it was admitted that "the substance of the conversation [between Holbrook and Petitioner at 3:15 PM] formed the basis *for some of the charges* thereafter made against the plaintiff." (italics supplied)

provision in this Act requiring specificity and detail in the reasons for the separation. The Agency had given Appellant a second reason for removal independent of the first one in which on passing on particular loans he had failed to consider "all important and relevant data." Appellant requested a list of the loans and instances when he had failed to consider "all important and relevant data". The Administrator replied specifying "several such." The Court relied upon the second reason for removal and in the complete sentence said: (p. 876) "In contrast, the charges here were amplified, upon request, by particulars, and in the light of all the circumstances, they furnished Appellant with sufficient information to prepare his defense". The Court below also cited the *Williams* case, *supra*, (App. 4a), but there to support the validity of the *second charge with particulars*, for Appellant's dismissal. (Italics supplied) We are unable to comprehend how the Agency could have given the Appellant any more specificity of the reasons for his dismissal than were given him in the second charge. At any rate, the Agency did not rely upon Appellant's disposition of a *single* loan to support the general charge. How then can it be said that Petitioner could answer a charge of intoxication on a certain date and at a certain place without first being apprised of the time and place.

Respondents' contention (Opp. 10-11(2)), as to Petitioner's Question IV, (Pet. 19-20), is without merit. Here it is proposed to substitute the Agency's Notice of November 14, 1952 to Petitioner of the effective date he "will be separated", it being on the very same day of November 14, 1952, (R14), for the statutory requisite of Section 14 that Petitioner was entitled to have in the decision which removed him which of the charges were relied upon for removal. But Respondents' reliance upon *Green* v. *Baughman*, and *Blackmon* v. *Lee*, *supra*, is misplaced. In the *Green* case, *supra*, the Court below said: (p. 612) "We think direct reference to the charges as sustained was a

sufficient statement of the reasons for the discharge." In the adverse decision which removed Petitioner (R18-19), there was no reference whatsoever to any charge so there could not have been any allusion to one or more of them as having been sustained. The adverse decision, as aforesaid, merely provided that, "Mr. Daly's removal • • • was warranted." Thus, if Petitioner's removal was "warranted", then as said in the *Mulligan* case, *supra*, (Pet. 19) his retention was such as to show his "unsuitability." In the *Blackmon* case, *supra*, the Court below had before it the Appellant's principal contention that Section 14 required a finding that his discharge could only be accomplished "for such cause as will promote the efficiency of the service." The Court rejected this contention, but Respondents quote (Opp. 11), "complied in all substance with Section 14." The complete sentence is stated: (p. 14) "Though all question might have been eliminated by more precision *in the original notification of removal* we think the foregoing demonstrates that the *procedures which were followed* complied in all substance with Section 14." (Italics supplied) Petitioner's question presented IV (Pet. 19-20) makes it abundantly clear that the precision "in the original notification of removal", bears no relationship to the requirement of Section 14 that the adverse decision which removed Petitioner must contain which of the charges were relied upon for removal. However, Appellant Blackmon made no contention that under Section 14 the adverse decision which removed him shall be "for reasons given in writing". In fact, the opinion fails to refer to the above quoted words of Section 14. Accordingly, this part of Section 14 which was not before the Court below was not one of the "procedures" which the Court below was called upon to follow.

## CONCLUSION

It is respectfully submitted that under all of the circumstances here and in the widespread public interest of the Government personnel as well as protection to those engaged in civil matters in our Courts, where frequently the United States is a party, the case is such as should call for the exercise of this Court's supervisory powers.

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| Veterans' Preference Act, 58 Stat. 390, 5 U. S. C. 863, Section 14 | 2, 4, 9, 10 |
| 12 F. R. 2855, as amended, 5 C. F. R. 22.2 | 3 |
| Miscellaneous: | |
| Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (1951), § 154 | 8 |

# In the Supreme Court of the United States

OCTOBER TERM, 1957

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No. 495

JOHN T. DALY, PETITIONER

*v.*

JOSEPH F. FINNEGAN, DIRECTOR, FEDERAL MEDIATION AND CONCILIATION SERVICE, L. E. EADY, DIRECTOR OF ADMINISTRATIVE MANAGEMENT, FEDERAL MEDIATION AND CONCILIATION SERVICE, PHILIP YOUNG, CHAIRMAN, UNITED STATES CIVIL SERVICE COMMISSION, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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### OPINIONS BELOW

The oral opinion of the District Court for the District of Columbia (R. 50–52)[1] and its order denying both parties' motions for summary judgment and remanding the case to the Civil Service Commission for a new hearing (R. 58–59) are not reported. The opinion of the United States Court of Appeals for the

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[1] Record references are to the joint appendix in the Court of Appeals which is on file in this Court.

District of Columbia Circuit (Pet. 1a–4a) is not yet reported.

## JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1957 (Pet. 1a). The petition for a writ of certiorari was filed on September 23, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

## QUESTION PRESENTED

Whether petitioner's dismissal from his federal position was accomplished with full observance of his substantive and procedural rights as a classified civil service employee with the status of a veterans' preference eligible.

## STATUTE AND REGULATION INVOLVED

Section 14 of the Veterans' Preference Act, 58 Stat. 390, 5 U. S. C. 863, provides in relevant part:

> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (ex-

cept where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: * * *.

12 F. R. 2855, as amended, 5 C. F. R. 22.2, provides in relevant part:

> * * * No employee covered by the regulations in this part shall be discharged, suspended for more than thirty (30) days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the employee whose discharge, suspension for more than thirty (30) days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty (30) days advance written notice stating any and all reasons, specifically and in detail, for any such proposed action. * * *

## STATEMENT

On September 10, 1952, the Federal Mediation and Conciliation Service served petitioner, a Commissioner of Conciliation, Grade GS–13, with a letter of charges,

advising him of his proposed removal for cause (R. 9–12). As the basis for "the proposed adverse action," the letter set out three independent charges. Charge 1, containing four specifications, related to dereliction of duty, failure to service an assigned case, and the giving of false information (R. 9–10).[2] Charge 2 related to a habit of intemperance which was seriously interfering with petitioner's work and in which a specific instance of intoxication on duty and a conversation with his superior about his intemperance were alleged (R. 10). Charge 3, containing three specifications, related to the disregarding of instructions by petitioner, being unavailable for assignments, and disregarding the case-reporting practices of the Service (R. 10–11).

Petitioner was advised that his proposed removal was being taken in accordance with the provisions of Section 14 of the Veterans' Preference Act, 58 Stat. 390, 5 U. S. C. 863; and he was informed of his right to answer the charges and submit supporting affidavits or evidence (R. 11).

In his response, petitioner did not deny any of the charges, but pleaded "extenuating circumstances" (R.

[2] It was specifically alleged: That on April 3, 1952, petitioner could not be found by the Regional Director in Philadelphia (where petitioner was then stationed) when needed to work on cases assigned to him; that in telephone conversations with the Regional Director on April 3, 1952, at 1:30 p. m. and 3:15 p. m., petitioner falsely stated that he was meeting with persons involved in his assigned cases; and that at 5:30 p. m. petitioner personally reported to the Regional Director and falsely stated that he had claimed only "contact" with the parties and, when confronted with proof that he had no such contact, did not explain his actions for the day (R. 9–10).

12–13). The Mediation and Conciliation Service thereafter rendered its "adverse decision", discharging petitioner effective November 14, 1952, and advising him of his right as a veterans' preference eligible to appeal to the Civil Service Commission (R. 14).

On appeal to the Commission, petitioner, for the first time, denied the charges (R. 15–17). The Chief Law Officer of the Civil Service Commission, after conducting an independent field investigation into the allegations, and, after according petitioner a personal hearing at which he was represented by counsel of his own choice, concluded that (R. 47):

> On the weight of all the evidence as to the merits of the case, it is concluded that the charges are sustained; that the discharge was for such cause as will promote the efficiency of the service within the meaning of Section 14; and that the personnel action was not arbitrary, unreasonable or capricious.

The decision was affirmed by the Commission (R. 18–19), and rehearing was denied (R. 21). Petitioner then brought this action for declaratory judgment and mandatory reinstatement, complaining that the charges were not sufficiently specific and were unsupported by evidence, that he had been denied a fair hearing because of prejudgment and that, in support of the first charge, evidence had been relied upon which violated Section 605 of the Communications Act, 48 Stat. 1103, 47 U. S. C. 605 (R. 1–9). Holding

that the disputed evidence[3] was inadmissible in the administrative proceeding, the District Court denied cross-motions for summary judgment and remanded the case to the Civil Service Commission for reconsideration without such evidence (R. 58–59).

The Court of Appeals reversed. Without passing upon the propriety of the disputed evidence, the court unanimously held that there was sufficient other evidence in the first charge, as well as the two other independent charges, which were valid and sufficient to sustain the dismissal (Pet. 1a–4a). Accordingly, the case was remanded to the District Court with instructions to grant the Government's motion for summary judgment (Pet. 4a).[4]

## ARGUMENT

The Court of Appeals properly declined to pass judgment upon the legality of certain disputed evidence which related only to a portion of one charge of misconduct against petitioner since, as the record fully demonstrated, there was sufficient evidence on that charge, as well as other independent charges of

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[3] This evidence consisted of a transcription of the telephone conversation at 3:15 p. m. on April 3, 1952, between petitioner and the Regional Director, taken by the Regional Director's secretary who had been directed by him to listen to the conversation on an extension (R. 30).

[4] The court also denied petitioner's motion to dismiss the appeal as premature, stating that the District Court's order had "completely and finally disposed of the case in the District Court, and we do not see how the Government could obtain a review of the order except by an appeal from it at this time" (Pet. 4a). Petitioner does not question this ruling. See *Cobbledick* v. *United States*, 309 U. S. 323, 330; *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434.

misconduct, upon which to sustain petitioner's dismissal. Petitioner's attempt to have this Court determine the legal propriety of the disputed evidence, when any such determination is wholly unnecessary to the disposition of the case, is contrary to this Court's settled review practice. Petitioner's allegations as to other defects in his dismissal are without substance and establish no basis for further review by this Court.

1. It is well settled that where one of several independent charges against a federal employee is held invalid, the employee's dismissal must be sustained so long as the remainder is sufficient. *Baughman* v. *Green*, 229 F. 2d 33 (C. A. D. C.); *Williams* v. *Cravens*, 210 F. 2d 874 (C. A. D. C.), certiorari denied, *sub nom. Williams* v. *Robbins*, 348 U. S. 819; *Deviny* v. *Campbell*, 194 F. 2d 876 (C. A. D. C.), certiorari denied, 344 U. S. 826. This principle was properly applied by the Court of Appeals in the instant case, since, at the most, the disputed evidence related only to a portion of one charge.

There were three charges with various allegations against petitioner. The first charge alleged specifically that (*a*) on the morning of April 3, 1952, petitioner could not be found by the Regional Director (Holbrook) "when you were needed to service the Food Fair-A. & P. Stores situation" assigned to him; (*b*) at 1:30 p. m. that day, petitioner falsely informed the Regional Director that he was meeting with the parties involved in the Food Fair case; (*c*) at 3:15 p. m. that day, petitioner telephoned the Regional

Director and falsely informed him that he was meeting a representative of the A. & P. Stores; and (*d*) when petitioner personally reported to the Regional Director at 5:30 p. m., he "compounded [his] falsification" by stating that he had claimed only "contact" with the parties and, upon presentation of proof that he had no such contact, he could not explain his actions for the day (R. 9–10).

The disputed evidence, *i. e.*, the transcription by Holbrook's secretary of the telephone conversation at 3:15 p. m. on April 3, 1952, is relevant, as the court below recognized, only to charge 1 (c)—that petitioner made false representations during that conversation. The transcription is immaterial to the rest of the first charge and, of course, to the second and third charges, which alleged intemperance, disregarding instructions, being arbitrarily unavailable for assignments, and disregarding case-reporting practices. Having ample independent grounds upon which to sustain petitioner's dismissal, the Court of Appeals thus found it unnecessary to determine whether the disputed evidence was or was not properly considered. Petitioner's insistence that this Court should resolve the issue, when, in these circumstances, it is unnecessary to the decision of the case, and is only of academic importance, is contrary to this Court's settled principles governing review. Cf. *Busby* v. *Electric Utilities Employees Union*, 323 U. S. 72; *United States* v. *Worley*, 281 U. S. 339; *Havemeyer* v. *Iowa County*, 3 Wall. 294, 303–304; see Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (1951), § 154.

2. Nor is there any substance to petitioner's assertions that his personnel action had been "prejudged", or that the procedural requirements of Section 14 of the Veterans' Preference Act, 58 Stat. 390, 5 U. S. C. 863, had not been properly observed.

(*a*) Petitioner's assertion of prejudgment apparently rests chiefly on the language of the letter of charges of September 10, 1952 (R. 9–12). But that letter, merely listing the charges against petitioner and notifying him of "proposed adverse action" only in the event of unsatisfactory answers or a failure to respond, clearly meets the requirement of statute and regulation. *Supra*, pp. 2–3.

(*b*) *Alleged procedural defects:*

(1) Petitioner complains that the charges were not sufficiently specific (Pet. 20). The first charge deals with the particular events of April 3, 1952, when petitioner allegedly was unavailable to handle cases assigned to him and misrepresented his whereabouts to the Regional Director. The second charge alleges a specific instance of intoxication on duty and a conversation with his superior about petitioner's intemperance. The third charge alleges a specific arbitrary tardiness and refers to omissions and delays in reporting cases of which petitioner had been apprised in a conversation of a certain day. These charges were sufficient because "in the light of all the circumstances, they furnished [petitioner] with sufficient information to prepare his defense". *Williams* v. *Cravens*, 210 F. 2d 874, 876 (C. A. D. C.), certiorari denied *sub nom. Williams* v. *Robbins*, 348 U. S. 819; see also *Baughman* v. *Green*, 229 F. 2d 33, 34

(C. A. D. C.); *Mulligan* v. *Dunlap*, 108 F. Supp. 296 (D. D. C.), reversed on other grounds, *sub nom. Mulligan* v. *Andrews*, 211 F. 2d 28 (C. A. D. C.).

Petitioner's reply to the charges did not deny or question them in any way, but merely pleaded "extenuating circumstances" (R. 13). Upon such a reply, the employing agency's decision to dismiss was entirely justified. Petitioner then appealed to the Civil Service Commission where, for the first time, he denied the charges (R. 15–17); however, the Commission held them to be valid and amply supported by the evidence (R. 18–19).*

(2) Equally without merit is petitioner's assertion that his dismissal was defective in that there had been a failure to comply with the requirement of Section 14 of the Veterans' Preference Act, 58 Stat. 390, 5 U. S. C. 863, that removal action against a preference eligible employee must be "for reasons given in writing." The letter of dismissal of November 14, 1952, expressly stated that "[b]ased on the charges furnished you September 10, 1952, you will be separated from your position * * *" (R. 14). This procedure, which, by direct reference, fully apprised petitioner of the reasons for his dismissal was a sufficient state-

* As to the specificity of the charges, the Chief Law Officer of the Civil Service Commission concluded (R. 43):

> The letter of proposed action and its contents has been reviewed and it is found that the reasons stated therein are specific and in sufficient detail so that the appellant was in a position to clearly understand the particular offenses charged against him. Accordingly, he was not prejudiced in submitting his defense and the notice is not defective in this connection.

ment of the reasons for his discharge, *Green* v. *Baughman*, 243 F. 2d 610 (C. A. D. C.), and "complied in all substance with Section 14." *Blackmon* v. *Lee*, 205 F. 2d 13, 14 (C. A. D. C.).

(3) Petitioner's assertion (Pet. 16) that the Chief Law Officer of the Civil Service Commission "enlarged or added new charges to the charges of September 10, 1952" is frivolous. In his recommended decision, the Chief Law Officer listed verbatim the very charges contained in the letter of September 10, 1952, and, after an analysis of all the evidence that had been compiled in the course of the Commission's independent investigation into those charges, concluded that "[o]n the weight of all the evidence * * * the charges are sustained" (R. 47).

## CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
*Solicitor General.*
GEORGE COCHRAN DOUB,
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OCTOBER 1957.